

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 303

UNITED STATES, APPELLANT,

VS.

VON'S GROCERY COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CALIFORNIA

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Appendix I

The following is a store-by-store, area-by-area analysis of our findings with respect to the overlap in draw areas of those Von's and Shopping Bag stores which the Government contends were near enough to each other to compete for the same customers.

I. The Monterey Park—Alhambra—Montebello—San Marino Area (Map—Exhibit—)

Analysis of Trading Areas.

1. Von's No. 4

Theoretical Draw Area:

Description:

Located in Monterey Park at 2280 Atlantic Boulevard, a main artery, near the East Los Angeles Junior College. Uninhabited areas, about 30% of the 2-mile draw area, lie to the northwest and northeast. The Long Beach Freeway lies 1.5 miles to the west and northwest. Whittier Blvd. cuts across 1.5 miles southwest of the store. The 2-mile draw area is bounded on the south by the Union Pacific R.R.

Estimated Population:

Within 1.5-mile radius	58,300
Within 2-mile radius	96,100

Estimated Number of Dwelling Units:

Within 1.5-mile radius	18,300
Within 2-mile radius	35,100

Major Competing Stores:

Within 1.5-mile radius	3 larger-chain stores 1 medium-chain store
Within 2-mile radius	3 larger-chain stores 2 medium-chain stores

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

The Long Beach Freeway forms a barrier at the border of the 1.5-mile zone on the west.

Estimated Population:

Within 1.5-mile radius	58,300
Within 2-mile radius	82,800

Estimated Number of Dwelling Units:

Within 1.5-mile radius	18,300
Within 2-mile radius	32,100

Major Competing Stores:

Within 1.5-mile radius	3 larger-chain stores 1 medium-chain store
Within 2-mile radius	3 larger-chain stores 2 medium-chain stores

Von's No. 29

Theoretical Draw Area:**Description:**

Located in Alhambra at 1000 E. Valley Boulevard, two blocks west of New Avenue and 0.5 mile north of the San Bernardino Freeway. The Alhambra Wash lies 0.75 mile to the east. The Southern Pacific R.R. runs 1 mile to the northwest.

Estimated Population:

Within 1.5-mile radius	54,000
Within 2-mile radius	87,000

Estimated Number of Dwelling Units:

Within 1.5-mile radius	20,300
Within 2-mile radius	32,500

Major Competing Stores:

Within 1.5-mile radius	7 larger-chain stores 1 Shopping Bag 5 medium-chain stores
Within 2-mile radius	10 larger-chain stores 1 Shopping Bag 5 medium-chain stores 2 smaller-firm stores

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

The Southern Pacific R.R. is a barrier to the north; the freeway is a barrier to the south; and the Alhambra Wash is a barrier to the east. The adjusted draw area is a strip about 1.25 miles in width, 2.25-2.75 miles long, and bisected by Valley Boulevard running its length.

Estimated Population:

Within 1.5-mile radius	18,400
Within 2-mile radius	20,400

Estimated Number of Dwelling Units:

Within 1.5-mile radius	6,500
Within 2-mile radius	6,900

Major Competing Stores:

Within 1.5-mile radius	1 larger-chain store 2 medium-chain stores
Within 2-mile radius	1 larger-chain store 2 medium-chain stores

3. Shopping Bag No. 11

Theoretical Draw Area:**Description:**

Located at the center of San Marino at 2270 Huntington Drive near the intersection Huntington and San Marino Avenue. The 2-mile draw area touches a line of the Santa Fe R.R. on the north, and the Pacific Electric R.R. runs within the 2-mile draw area on the south. The store is located about 0.25 mile from the Huntington Library.

Estimated Population:

Within 1.5-mile radius	34,900
Within 2-mile radius	62,200

Estimated Number of Dwelling Units:

Within 1.5-mile radius	12,000
Within 2-mile radius	23,000

Major Competing Stores:

Within 1.5-mile radius	3 larger-chain stores 1 Shopping Bag 1 smaller-firm store
Within 2-mile radius	5 larger-chain stores 1 Shopping Bag 2 smaller-firm stores 2 medium-chain stores

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

The Santa Fe R.R. forms a barrier at the south end of the draw area.

Estimated Population:

Within 1.5-mile radius	34,900
Within 2-mile radius	61,000

Estimated Number of Dwelling Units:

Within 1.5-mile radius	12,000
Within 2-mile radius	22,400

Major Competing Stores:

Within 1.5-mile radius	3 larger-chain stores 1 Shopping Bag 1 smaller-firm store
Within 2-mile radius	5 larger-chain stores 1 Shopping Bag 2 medium-chain stores 2 smaller-firm stores

4. Shopping Bag No. 16**Theoretical Draw Area:****Description:**

Located in Alhambra at 2200 W. Valley Boulevard. The store is 0.75 mile west of Atlantic Boulevard and 0.5 mile north of the San Bernardino Freeway. The Southern Pacific R.R. splits the draw area into three parts. The Alhambra Wash comes within two miles of the store. An open area exists to the south.

Estimated Population:

Within 1.5-mile radius	45,700
Within 2-mile radius	74,400

Estimated Number of Dwelling Units:

Within 1.5-mile radius	16,700
Within 2-mile radius	27,700

Major Competing Stores:

Within 1.5-mile radius	4 larger-chain stores 1 medium-chain store
Within 2-mile radius	7 larger-chain stores 1 Shopping Bag 1 medium-chain store 2 smaller-firm stores

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

The railroad line north of the store forms a barrier to access from the northern part of the draw area. The San Bernardino Freeway runs parallel to the railroad south of the store. The actual draw area is a strip 0.75 mile in width and 3-4 miles long, with a major traffic artery, W. Valley Boulevard, bisecting the strip lengthwise.

Estimated Population:

Within 1.5-mile radius	16,000
Within 2-mile radius	23,600

Estimated Number of Dwelling Units:

Within 1.5-mile radius	5,900
Within 2-mile radius	9,700

Major Competing Stores:

Within 1.5-mile radius	2 larger-chain stores 1 medium-chain store
Within 2-mile radius	2 larger-chain stores 1 medium-chain store

5. Shopping Bag No. 27**Theoretical Draw Area:****Description:**

Located in the heart of Monterey Park at 12776 Garfield Avenue, near the post office, one block from the intersection of Garvey and Garfield Avenues. Two large uninhabited areas lie to the south and west. The San Bernardino Freeway is located 0.5 mile to the north. The Southern Pacific R.R. lies 1.5 miles northwest of the store. The Alhambra Wash is located 1.75 miles to the northeast.

Estimated Population:

Within 1.5-mile radius	50,300
Within 2-mile radius	81,400

Estimated Number of Dwelling Units:

Within 1.5-mile radius	18,100
Within 2-mile radius	29,300

Major Competing Stores:

Within 1.5-mile radius	3 larger-chain stores 1 Von's 2 medium-chain stores 1 smaller-firm store
Within 2-mile radius	6 larger-chain stores 1 Von's 2 medium-chain stores 2 smaller-firm stores

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

A barrier is formed by the Santa Ana Freeway 0.5 mile to the north. South of the Freeway, the Alhambra Wash forms a barrier 1.75 miles to the east.

Estimated Population:

Within 1.5-mile radius	29,400
Within 2-mile radius	49,400

Estimated Number of Dwelling Units:

Within 1.5-mile radius	11,200
Within 2-mile radius	18,000

Major Competing Stores:

Within 1.5-mile radius	2 larger-chain stores 1 smaller-firm store
Within 2-mile radius	2 larger-chain stores 2 smaller-firm stores

6. Shopping Bag No. 40

Theoretical Draw Area:

Description:

Located in Montebello at 1201 W. Whittier on the edge of the center city. The store is 0.75 mile west of the Rio Hondo River. Two uninhabited areas lie to the north and southeast of the store. The Union Pacific R.R. runs through the area 0.5 mile south of the store. The Santa Fe R.R. touches the southwest edge of the 2-mile draw area.

Estimated Population:

Within 1.5-mile radius	29,800
Within 2-mile radius	54,300

Estimated Number of Dwelling Units:

Within 1.5-mile radius	10,300
Within 2-mile radius	17,900

Major Competing Stores:

Within 1.5-mile radius	1 larger-chain store
	1 medium-chain store
Within 2-mile radius	2 larger-chain stores
	1 medium-chain store
	1 smaller-firm store

Adjusted Draw Area:

Reasons for Adjusting Draw Area:

The Rio Hondo River is a barrier for all residents of the 2-mile draw area east of the river. A small pocket of residents east of the river within the 1.5-mile area do have reasonable access to the store and are considered part of the draw. The railroad does not appear to constitute a significant barrier.

Estimated Population:

Within 1.5-mile radius	28,500
Within 2-mile radius	39,900

Estimated Number of Dwelling Units:

Within 1.5-mile radius	9,700
Within 2-mile radius	13,400

Major Competing Stores:

Within 1.5-mile radius	1 larger-chain store
	1 medium-chain store
Within 2-mile radius	2 larger-chain stores
	1 medium-chain store
	1 smaller-firm store

B. Analysis of Overlapping Trade Areas.**1. Von's No. 4 and Shopping Bag No. 16****Theoretical Overlap Area****Description:**

The 1.5-mile overlap area lies in Coyote Pass, an uninhabited area, and at least $\frac{2}{3}$ of the 2-mile overlap area lies there also. The Pass is situated in the center of the overlap zones.

Estimated Population:

Within 1.5-mile zone	0
Within 2-mile zone	12,700

Estimated Number of Dwelling Units:

Within 1.5-mile zone	0
Within 2-mile zone	3,000

Major Competing Stores:

Within 1.5-mile zone	0
Within 2-mile zone	1 smaller-firm store

Adjusted Overlap Area:

None

General Observations:

Coyote Pass forms a natural barrier between the two stores and residents would have to take roads leading past other stores. Four larger-chain stores and one smaller-firm store lie closer to the residents in the overlap area than the subject stores.

2. Von's No. 4 and Shopping Bag No. 27**Theoretical Overlap Area:****Description:**

The 1.5-mile overlap area is 1.75 miles long and 0.5 mile in depth. The 2-mile overlap area is 3 miles long and 1.5 miles in depth. About $\frac{1}{4}$ of the 2-mile overlap area lies in Coyote Pass and is uninhabited. Part of the same zone contains the Garvey Reservoir. Atlantic Boulevard and Garfield Avenue are the only through north-south streets in the overlap area.

Estimated Population:

Within 1.5-mile zone	3,900
Within 2-mile zone	19,300

Estimated Number of Dwelling Units:

Within 1.5-mile zone	1,300
Within 2-mile zone	6,000

Major Competing Stores:

Within 1.5-mile zone	0
Within 2-mile zone	1 larger-chain store 1 smaller-firm store

Adjusted Overlap Area:

Same as above.

General Observations:

Four other stores are closer for the customers within the overlap zone than are the two subject stores. Because Atlantic Boulevard and Garfield Avenue are the only through north-south streets in the overlap area most potential customers in the overlap area could be intercepted by other stores on their way to the subject stores.

3. Von's No. 4 and Shopping Bag No. 40

Theoretical Overlap Area:

Description:

The 1.5-mile overlap area is almost nonexistent. The 2-mile overlap area is bisected by Beverly Boulevard and is approximately $\frac{2}{3}$ uninhabited.

Estimated Population:

Within 1.5-mile zone	800
Within 2-mile zone	16,000

Estimated Number of Dwelling Units:

Within 1.5-mile zone	280
Within 2-mile zone	5,800

Major Competing Stores:

Within 1.5-mile zone	None
Within 2-mile zone	1 larger-chain store 1 smaller-firm store

Adjusted Overlap Area:

Same as above.

General Observations:

Four larger-chain stores and one smaller-firm store lie either closer or as close as the subject stores. In addition, the two main thoroughfares giving access to the area, Garfield Avenue and Beverly Boulevard, intersect in the center of the overlap zone; potential customers could be intercepted by at least one other store.

4. Von's No. 29 and Shopping Bag No. 16**Theoretical Overlap Area:****Description:**

The center axis of the 1.5 and 2-mile overlap areas is Atlantic Boulevard. The length of the 1.5-mile overlap area is 2 miles; the depth is 1 mile. The center axis length of the 2-mile overlap area is 3.25 miles; its depth is 2 miles. The Southern Pacific R.R. and San Bernardino Freeway cross both overlap areas. Coyote Pass bounds the 2-mile draw area on the southwest.

Estimated Population:

Within 1.5-mile zone	11,150
Within 2-mile zone	39,950

Estimated Number of Dwelling Units:

Within 1.5-mile zone	4,870
Within 2-mile zone	11,450

Major Competing Stores:

Within 1.5-mile zone	3 larger-chain stores 1 medium-chain store
Within 2-mile zone	6 larger-chain stores 1 medium-chain store

Adjusted Overlap Area:**Reason for Adjusting Overlap Area:**

The crossing of the overlap area by the Southern Pacific R.R. and the San Bernardino Freeway form barriers for both the 1.5-mile and 2-mile overlap areas. These barriers decrease the overlap area to a square mile (1 x 1 mile) for the 1.5-mile overlap area and for the 2-mile area to dimensions of 1 by 2 miles.

Estimated Population:

Within 1.5-mile zone	6,630
Within 2-mile zone	16,730

Estimated Number of Dwelling Units:

Within 1.5-mile zone	2,830
Within 2-mile zone	6,910

Major Competing Stores:

Within 1.5-mile zone	1 larger-chain store
	1 medium-chain store
Within 2-mile zone	1 larger-chain store
	1 medium-chain store

General Observations:

Two other stores are located on Valley Boulevard approximately midway between the subject stores and could intercept potential customers in the adjusted overlap area.

5. Von's No. 29 and Shopping Bag No. 11

Theoretical Overlap Area:**Description:**

The 1.5-mile draw area radii intersect with virtually no area between them. The 2-mile overlap area is 2.75 miles long and 1 mile deep. Atlantic Blvd. intersects with the west corner of the 2-mile area and the Southern Pacific R.R. curves through the area with an intersection at the east corner. The Alhambra Wash is located on the southwest edge of the 2-mile overlap area.

Estimated Population:

Within 2-mile zone	13,100
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Estimated Number of Dwelling Units:

Within 2-mile zone	5,160
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Major Competing Stores:

Within 2-mile zone	2 larger-chain stores 1 smaller-firm store
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Adjusted Overlap Area:**Reasons for Adjusting Overlap Area:**

The Southern Pacific R.R. forms a barrier on the south side of the 2-mile overlap area.

Estimated Population:

Within 2-mile zone	9,930
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Estimated Number of Dwelling Units:

Within 2-mile zone	3,970
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Major Competing Stores:

Within 2-mile zone	2 larger-chain stores 1 smaller-firm store
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General Observations:

The Southern Pacific R.R. and the Alhambra Wash form barriers between the two subject stores and divide the overlap area into two parts. The number of other stores in each segment of the overlap area and adjacent thereto are about equal in number.

6. Von's No. 29 and Shopping Bag No. 27**Theoretical Overlap Area:****Description:**

The 1.5-mile radius overlap is 2.75 miles long and 2 miles wide. The 2-mile radius overlap area is 3.75 miles long and 2.75 miles wide. The Southern Pacific R.R. passes through the 2-mile overlap area at the northwest edge of the 1.5-mile zone. The San Bernardino Freeway crosses both zones and the Alhambra Wash passes through the 2-mile zone on the northeast. An uninhabited area, Coyote Pass, lies on the southwest edge of the 2-mile overlap area.

Estimated Population:

Within 1.5-mile zone	31,700
Within 2-mile zone	54,980

Estimated Number of Dwelling Units:

Within 1.5-mile zone	12,170
Within 2-mile zone	21,170

Major Competing Stores:

Within 1.5-mile zone	3 larger-chain stores 2 medium-chain stores
Within 2-mile zone	6 larger-chain stores 3 medium-chain stores 2 smaller-firm stores

Adjusted Overlap Area:

None.

Reasons:

The Southern Pacific R.R. forms a barrier to the customers in the 2-mile zone on the northwest edge of the 1.5-mile overlap. The San Bernardino Freeway is a barrier to the customers on the north who are more than 0.5 mile south of Valley Blvd. The Alhambra Wash cuts off customers on the east edge of the 2-mile overlap zone.

General Observations:

The San Bernardino Freeway is a barrier bisecting both the 1.5- and 2-mile overlap areas. This effectively splits the area between the two subject stores. The number of other stores in each of the two sectors is approximately equal.

II. The West Covina—La Puente Area (Map—Exhibit—)**A. Analysis of Trading Areas.****1. Von's No. 31****Theoretical Draw Area:****Description:**

Located in West Covina at 973 S. Glendora Avenue near Cameron Avenue. An uninhabited area, the San Jose Hills, is located on the southeast and removes a portion of the 1.5- and 2-mile draw areas. The San Bernardino Freeway crosses both the 1.5- and the 2-mile draw areas 1.25 miles to the north. Walnut Creek also crosses both draw areas 1 mile to the north. The area is characterized by a great number of dead-end streets so that traffic is channeled onto the main thoroughfares. A line of the Pacific Electric R.R. is on the north edge of the 2-mile draw area.

Estimated Population:

Within 1.5-mile radius	38,620
Within 2-mile radius	77,210

Estimated Number of Dwelling Units:

Within 1.5-mile radius	10,370
Within 2-mile radius	20,500

Major Competing Stores:

Within 1.5-mile radius	4 larger-chain stores 1 Shopping Bag 2 smaller-firm stores
Within 2-mile radius	6 larger-chain stores 2 Shopping Bag 1 medium-chain store 2 smaller-firm stores

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

The San Bernardino Freeway is a barrier which cuts across the 1.5- and 2-mile draw areas.

Estimated Population:

Within 1.5-mile radius	33,520
Within 2-mile radius	57,230

Estimated Number of Dwelling Units:

Within 1.5-mile radius	8,900
Within 2-mile radius	14,820

Major Competing Stores:

Within 1.5-mile radius	4 larger-chain stores 1 Shopping Bag 2 smaller-firm stores
Within 2-mile radius	5 larger-chain stores 2 Shopping Bag 1 medium-chain store 2 smaller-firm stores

2. Shopping Bag No. 28

Theoretical Draw Area:

Description:

The store is located in La Puente at 15427 Amar Road near the intersection of N. Glendora Avenue, 1.75 miles north of the Southern Pacific R.R. line. On the east a portion of both the 1.5- and 2-mile draw areas are in the uninhabited San Jose Hills. The 2-mile draw area on the north is bordered by Walnut Creek. La Puente Hill lies within the 1.5- and 2-mile draw area on the southeast.

Estimated Population:

Within 1.5-mile radius	32,510
Within 2-mile radius	54,900

Estimated Number of Dwelling Units:

Within 1.5-mile radius	8,330
Within 2-mile radius	14,020

Major Competing Stores:

Within 1.5-mile radius	3 larger-chain stores 2 smaller-firm stores
Within 2-mile radius	4 larger-chain stores 1 Von's 2 smaller-firm stores

Adjusted Draw Area:

Reasons for Adjusting Draw Area:

On the southwest the Southern Pacific R.R. forms a barrier to potential customers in both the 1.5- and 2-mile draw areas.

Estimated Population:

Within 1.5-mile radius	32,110
Within 2-mile radius	54,100

Estimated Number of Dwelling Units:

Within 1.5-mile radius	8,230
Within 2-mile radius	13,820

Major Competing Stores:

Within 1.5-mile zone	3 larger-chain stores
	2 smaller-firm stores
Within 2-mile zone	3 larger-chain stores
	1 Von's
	2 smaller-firm stores

Shopping Bag No. 32**Theoretical Draw Area:****Description:**

Located in West Covina at 1170 W. Garvey Blvd., near Sunset Avenue, and bordering the San Bernardino Freeway. The store is adjacent to the center of the City of West Covina. Walnut Creek lies 0.25 mile south of the store and a line of the Pacific Electric R.R. borders the 1.5-mile draw area on the north.

Estimated Population:

Within 1.5-mile radius	43,620
Within 2-mile radius	73,730

Estimated Number of Dwelling Units:

Within 1.5-mile radius	12,040
Within 2-mile radius	20,060

Major Competing Stores:

Within 1.5-mile radius	6 larger-chain stores
	1 Von's
Within 2-mile radius	11 larger-chain stores
	1 Von's
	1 medium-chain store
	1 smaller-firm store

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

The San Bernardino Freeway immediately to the north of the store is a barrier reducing the theoretical 1.5- and 2-mile draw areas.

Estimated Population:

Within 1.5-mile radius	17,200
Within 2-mile radius	36,440

Estimated Number of Dwelling Units:

Within 1.5-mile radius	4,650
Within 2-mile radius	9,770

Major Competing Stores:

Within 1.5-mile radius	3 larger-chain stores 1 Von's
Within 2-mile radius	4 larger-chain stores 1 Von's 1 medium-chain store 1 smaller-firm store

B. Analysis of Overlapping Trade Areas.**1. Von's No. 31 and Shopping Bag No. 28****Theoretical Overlap Area:****Description:**

The 1.5-mile overlap area is 2.25 miles long and 1.25 miles in depth. The 2-mile overlap area is 3.5 miles long and 2.25 miles in depth. Glendora Avenue bisects both areas through the shorter dimension. The San Jose Hills lie in the southeast portion of the overlap area and decrease their area by about 10 and 20% for the 1.5- and 2-mile area, respectively.

Estimated Population:

Within 1.5-mile zone	14,700
Within 2-mile zone	39,280

Estimated Number of Dwelling Units:

Within 1.5-mile zone	3,840
Within 2-mile zone	10,230

Major Competing Stores:

Within 1.5-mile zone	1 larger-chain store 2 smaller-firm stores
Within 2-mile zone	1 larger-chain store 2 smaller-firm stores

Adjusted Overlap Area:

Same as theoretical overlap area.

General Observations:

The subject stores may be considered, for practical purposes, as being located on the same street, Glendora Avenue, and lie in the strip between the 1.5- and 2-mile overlap areas, separated by a distance of 1.75 miles. Two other stores are located on Glendora Avenue between the subject stores. Two other larger-chain stores are adjacent to Sunset Avenue which runs parallel to Glendora Avenue, and approximately 0.5 mile to the west.

2. Von's No. 31 and Shopping Bag No. 32**Theoretical Overlap Area:****Description:**

The 1.5-mile draw area overlap is 2.75 miles long and 2 miles in depth. The 2-mile area is 3.75 miles long and 3 miles deep. The San Bernardino Freeway crosses both draw areas as does Walnut Creek, the latter forming the lengthwise axis of the two overlap areas. On the southeast edge of the 2-mile overlap zone is the San Jose Hills, an uninhabited area.

Estimated Population:

Within 1.5-mile zone	23,820
Within 2-mile zone	54,970

Estimated Number of Dwelling Units:

Within 1.5-mile zone	6,530
Within 2-mile zone	14,350

Major Competing Stores:

Within 1.5-mile zone	3 larger-chain stores
Within 2-mile zone	5 larger-chain stores
	1 medium-chain store
	1 smaller-firm store

Adjusted Overlap Area:**Reasons for Adjusting Overlap:**

The San Bernardino Freeway is a barrier to about 40% of the 1.5- and 2-mile overlap areas north of the freeway.

Estimated Population:

Within 1.5-mile zone	18,720
Within 2-mile zone	36,270

Estimated Number of Dwelling Units:

Within 1.5-mile zone	5,080
Within 2-mile zone	8,970

Major Competing Stores:

Within 1.5-mile zone	3 larger-chain stores
Within 2-mile zone	4 larger-chain stores
	1 medium-chain store
	1 smaller-firm store

General Observations:

Because of the road network potential customers on the west side of both areas could be intercepted by a competitor's store before arriving at either Von's or Shopping Bag Stores. The existence of Walnut Creek midway between the two stores forms a partial barrier to the free movement of customers.

III. The Downey—Norwalk—Pico Rivera Area

(Map — Exhibit —)

A. Analysis of Trading Areas.

1. Von's No. 5

Theoretical Draw Area:

Description:

Located in Downey at 10001 Paramount Boulevard, near the intersection of Florence Avenue and Paramount. The store is situated in a well populated district. The Rio Hondo River is located approximately 0.5 mile northwest of the store. A branch of the Southern Pacific R.R. runs about 1 mile southwest of the store. The Santa Ana Freeway is located approximately 0.75 mile northeast of the store.

Estimated Population:

Within 1.5-mile radius	48,500
Within 2-mile radius	79,100

Estimated Number of Dwelling Units:

Within 1.5-mile radius	15,600
Within 2-mile radius	25,700

Major Competing Stores:

Within 1.5-mile radius	3 larger-chain stores
	1 medium-chain store
	1 smaller-firm store
Within 2-mile radius	4 larger-chain stores
	1 Shopping Bag
	1 medium-chain store
	1 smaller-firm store

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

The area within which the store is situated is confined by the Rio Hondo River, Southern Pacific R.R. and the Santa Ana Freeway.

Estimated Population:

Within 1.5-mile radius	30,100
Within 2-mile radius	34,900

Estimated Number of Dwelling Units:

Within 1.5-mile radius	9,800
Within 2-mile radius	11,000

Major Competing Stores:

Within 1.5-mile radius	2 larger-chain stores
Within 2-mile radius	2 larger-chain stores
	1 medium-chain store

2. Von's (Planned in Norwalk)

Theoretical Draw Area:

Description:

This store was to be located in Norwalk at the junction of Norwalk Blvd. and Imperial Highway. However, the developer of this property was unable to obtain a satisfactory zone variance and, as a result, all plans for the construction of a store at this location have been abandoned. There is a residential area on the south and west of this property with the area on the north and east being largely undeveloped. The Santa Ana Freeway runs 0.25 mile southwest of the store. Firestone Blvd. and the Southern Pacific R.R. are on the southeast about 0.5 mile away. The Santa Fe R.R. is located about 1 mile to the east.

Estimated Population:

Within 1.5-mile radius	56,900
Within 2-mile radius	64,500

Estimated Number of Dwelling Units:

Within 1.5-mile radius	14,220
Within 2-mile radius	20,320

Major Competing Stores:

Within 1.5-mile radius	2 larger-chain stores 1 medium-chain store 1 smaller-firm store
Within 2-mile radius	4 larger-chain stores 2 medium-chain stores 3 smaller-firm stores

Adjusted Draw Area:

Reasons for Adjusting Draw Area:

The Santa Fe R.R. forms a barrier on the east and the Santa Ana Freeway a barrier on the northwest. The Southern Pacific R.R. on the west is also a barrier.

Estimated Population:

Within 1.5-mile radius	19,200
Within 2-mile radius	21,900

Estimated Number of Dwelling Units:

Within 1.5-mile radius	4,830
Within 2-mile radius	6,490

Major Competing Stores:

Within 1.5-mile radius	1 larger-chain store
Within 2-mile radius	2 larger-chain stores

3. Shopping Bag No. 20**Theoretical Draw Area:****Description:**

Situated in Pico-Rivera at the intersection of two main roads, Washington Boulevard and Passons Boulevard. The San Gabriel River cuts the territory in a north-south direction about 0.5 mile east of the store, and the Santa Fe Railroad cuts across about 0.75 mile to the south. The Rio Hondo River cuts thru 1.5 miles to the west. The area to the west and north is relatively unpopulated.

Estimated Population:

Within 1.5-mile radius	46,500
Within 2-mile radius	66,150

Estimated Number of Dwelling Units:

Within 1.5-mile radius	12,500
Within 2-mile radius	18,700

Major Competing Stores:

Within 1.5-mile radius	3 larger-chain stores
	1 medium-chain store
Within 2-mile radius	3 larger-chain stores
	1 Shopping Bag
	2 medium-chain stores

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

The Rio Hondo and San Gabriel Rivers and the Santa Fe and Union Pacific Railroads are barriers enclosing and reducing the draw area.

Estimated Population:

Within 1.5-mile radius	20,300
Within 2-mile radius	22,200

Estimated Number of Dwelling Units:

Within 1.5-mile radius	5,500
Within 2-mile radius	6,000

Major Competing Stores:

Within 1.5-mile radius	None
Within 2-mile radius	None except one Shopping Bag

4. Shopping Bag No. 35**Theoretical Draw Area:****Description:**

Store located in Downey at 9058 E. Firestone Boulevard, near the intersection of Lakewood and Firestone Boulevards. The San Gabriel River passes through the draw area 0.75 of a mile to the southeast. The Southern Pacific R.R. bisects the area less than 0.25 mile southwest of the store. The area to the south of the supermarket is nonresidential.

Estimated Population:

Within 1.5-mile radius	41,000
Within 2-mile radius	79,400

Estimated Number of Dwelling Units:

Within 1.5-mile radius	13,500
Within 2-mile radius	24,100

Major Competing Stores:

Within 1.5-mile radius	3 larger-chain stores 1 Von's 1 medium-chain store
Within 2-mile radius	6 larger-chain stores 1 Von's 2 medium-chain stores 2 smaller-firm stores

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

San Gabriel River limits access to the area on the east and the Santa Ana Freeway to areas on the northeast.

Estimated Population:

Within 1.5-mile radius	36,300
Within 2-mile radius	64,900

Estimated Number of Dwelling Units:

Within 1.5-mile radius	11,650
Within 2-mile radius	20,600

Major Competing Stores:

Within 1.5-mile radius	3 larger-chain stores 1 Von's 1 medium-chain store
Within 2-mile radius	4 larger-chain stores 1 Von's 1 medium-chain store 1 smaller-firm store

B. Analysis of Overlapping Trade Areas.

1. Von's No. 5 and Shopping Bag No. 35

Theoretical Overlap Area:

Description:

The major axis of the 1.5-mile overlap area is 2.5 miles and the depth is 1.5 miles. The major axis of the 2-mile overlap area is 3.5 miles and the depth is 2.25 miles. The Southern Pacific R.R. passes through both overlap zones. The area is characterized by a grid network of roads and high population density.

Estimated Population:

Within 1.5-mile zone	16,070
Within 2-mile zone	41,310

Estimated Number of Dwelling Units:

Within 1.5-mile zone	5,790
Within 2-mile zone	17,020

Major Competing Stores:

Within 1.5-mile zone	2 larger-chain stores
Within 2-mile zone	4 larger-chain stores
	1 medium-chain store

Adjusted Overlap Area:

Reasons for Adjusting Overlap Area:

The overlap area is cut on the southwest by the Southern Pacific Railroad.

Estimated Population:

Within 1.5-mile zone	14,690
Within 2-mile zone	29,660

Estimated Number of Dwelling Units:

Within 1.5-mile zone	5,320
Within 2-mile zone	13,240

Major Competing Stores:

Within 1.5-mile zone	2 larger-chain stores
Within 2-mile zone	3 larger-chain stores
	1 medium-chain store

General Observations:

There are four other stores within a short distance of the potential customers in the adjusted overlap area.

2. Von's No. 5 and Shopping Bag No. 20**Theoretical Draw Area:****Description:**

The 1.5-mile overlap area is very small and sparsely populated. The 2-mile overlap is crossed by the Pacific Electric R.R., the Santa Fe R.R., the Rio Hondo Branch of the Los Angeles River and the Santa Ana Freeway. Rosemead Boulevard and Telegraph Road intersect almost in the center of the two overlap areas. About a third of each overlap area is uninhabited.

Estimated Population:

Within 1.5-mile zone	600
Within 2-mile zone	11,520

Estimated Number of Dwelling Units:

Within 1.5-mile zone	160
Within 2-mile zone	2,290

Major Competing Stores:

None

Adjusted Overlap Area:

None.

General Observations:

The two railroads, the Santa Ana Freeway and the Rio Hondo River are all barriers separating the draw areas of the subject stores into two distinct zones.

3. Von's (planned in Norwalk)* and Shopping Bag No. 35**Theoretical Overlap Area:****Description:**

There is no 1.5-mile overlap area. The Santa Ana Freeway and the two railroads pass through the 2-mile overlap area. The San Gabriel River runs just west of the overlap area.

Estimated Population:

Within 2-mile zone	10,100
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Estimated Number of Dwelling Units:

Within 2-mile zone	2,400
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Major Competing Stores:

Within 2-mile zone	1 larger-chain store
	1 medium-chain store
	1 smaller-firm store

Adjusted Overlap Area:

None.

Reason:

The railroads and freeway each form barriers which cut up the road network.

* Not now to be opened due to difficulties in obtaining necessary zone variance—see p. 45.

General Observations:

The two stores are separated not only by the river but also by the railroad and the freeway. There is only one principal road between the two stores and four other stores are located adjacent to this artery.

IV. The Reseda—Canoga Park—Granada Hills—Northridge Area (Map — Exhibit —)

A. Analysis of Trading Areas.

1. Von's No. 22

Theoretical Draw Area:

Description:

The store is located in Reseda at 18247 Sherman Way, between Reseda Boulevard and Linden Avenue. The Sepulveda Flood Control Basin extends into the 1.5- and 2-mile draw areas. The draw areas are divided into three segments by branches of the Los Angeles River. Bull Creek bounds the 2-mile draw area on the east. A line of the Southern Pacific R.R. crosses the draw areas at the edge of the 1.5-mile radius on the south and the Ventura Freeway bounds the 2-mile draw on the south.

Estimated Population:

Within 1.5-mile radius	50,000
Within 2-mile radius	83,180

Major Competing Stores:

Within 1.5-mile radius	5 larger-chain stores
	4 medium-chain stores
Within 2-mile radius	6 larger-chain stores
	1 Shopping Bag
	7 medium-chain stores

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

The Los Angeles River and Wilbur Wash are barriers which reduce the theoretical draw area.

Estimated Population:

Within 1.5-mile radius	39,480
Within 2-mile radius	56,230

Major Competing Stores:

Within 1.5-mile radius	4 larger-chain stores 2 medium-chain stores
Within 2-mile radius	4 larger-chain stores 5 medium-chain stores

2. Von's (Planned in Canoga Park)**Theoretical Draw Area:****Description:**

The store is to be located in Canoga Park at 20151 Roscoe Boulevard at Winnetka Avenue. One line of the Southern Pacific R.R. crosses the draw area 1 mile to the north and another line 1.5 miles to the west of the store. Most of the theoretical draw area beyond the tracks on the north is uninhabited. Browns Canyon Wash crosses the draw area 1 mile west of the store and Wilbur Wash crosses 1.5 miles to the east.

Estimated Population:

Within 1.5-mile radius	32,790
Within 2-mile radius	54,860

Major Competing Stores:

Within 1.5-mile radius	2 larger-chain stores 1 medium-chain store
Within 2-mile radius	3 larger-chain stores 2 medium-chain stores

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

The railroad on the north, Browns Canyon Wash, and Wilbur Wash are all barriers diminishing the theoretical draw area.

Estimated Population:

Within 1.5-mile radius	22,380
Within 2-mile radius	33,570

Major Competing Stores:

Within 1.5-mile radius	1 larger-chain store
	1 medium-chain store
Within 2-mile radius	1 larger-chain store
	1 medium-chain store

3. Von's (Planned in Northridge at Nordhoff Street and Reseda Boulevard)

Theoretical Draw Area:**Description:**

The store is to be located in Northridge at Nordhoff Street and Reseda Boulevard. Limekill Canyon Wash and Montaria Lake bound the 2-mile draw area on the northwest. Wilbur Wash and Aliso Canyon Wash cross the draw area 0.75 mile west of the store and the Southern Pacific R.R. crosses the draw area 0.5 mile to the south.

Estimated Population:

Within 1.5-mile radius	23,700
Within 2-mile radius	45,030

Major Competing Stores:

Within 1.5-mile radius	2 medium-chain stores
Within 2-mile radius	2 medium-chain stores

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

The Wilbur Wash and Aliso Canyon Wash are barriers as is the Southern Pacific R.R.

Estimated Population:

Within 1.5-mile radius	8,680
Within 2-mile radius	12,430

Major Competing Stores:

Within 1.5-mile radius	2 medium-chain stores
Within 2-mile radius	2 medium-chain stores

4. Von's (planned in Granada Hills)**Theoretical Draw Area:****Description:**

To be located in Granada Hills at the intersection of San Fernando Mission Boulevard and Woodley Avenue. About a third of the draw area lies in Bull Canyon. Bull Creek is 0.25 mile west of the store.

Estimated Population:

Within 1.5-mile radius	37,400
Within 2-mile radius	52,000

Major Competing Stores:

Within 1.5-mile radius	4 larger-chain stores
Within 2-mile radius	5 larger-chain stores

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

Bull Creek is a barrier which impedes customers from access to the store.

Estimated Population:

Within 1.5-mile radius	19,400
Within 2-mile radius	29,800

Major Competing Stores:

Within 1.5-mile radius	3 larger-chain stores
Within 2-mile radius	4 larger-chain stores

5. Von's (planned in Northridge at Nordhoff Street and Woodley Avenue)

Theoretical Draw Area:**Description:**

To be located in Northridge near the intersection of Nordhoff Street and Woodley Avenue. Bull Creek runs through the draw area approximately 0.5 mile to the west of the store. A flood control channel passes through the draw areas on the east boundary of the 1.5-mile draw area. The Southern Pacific R.R. crosses the draw area 1 mile south of the store.

Estimated Population:

Within 1.5-mile radius	29,200
Within 2-mile radius	52,400

Major Competing Stores:

Within 1.5-mile radius	1 smaller-firm store
Within 2-mile radius	2 larger-chain stores
	1 medium-chain store
	1 smaller-firm store

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

The flood control channel and Bull Creek are barriers which limit access to the store.

Estimated Population:

Within 1.5-mile radius	22,600
Within 2-mile radius	30,600

Major Competing Stores:

Within 1.5-mile radius	1 smaller-firm store
Within 2-mile radius	2 larger-chain stores
	1 smaller-firm store

6. Shopping Bag No. 39**Theoretical Draw Area:****Description:**

The store is located in Reseda at 19333 Victory Boulevard near Tampa Avenue. The Los Angeles River is north of the store. A line of the Southern Pacific R.R. lies 0.5 mile south of the store. The Chalk Hills are within the southwest segment of both draw areas. The Wilbur Wash passes through the draw area 0.75 mile east of the store.

Estimated Population:

Within 1.5-mile radius	38,930
Within 2-mile radius	67,230

Major Competing Stores:

Within 1.5-mile radius	5 larger-chain stores
	3 medium-chain stores
Within 2-mile radius	7 larger-chain stores
	1 Von's
	3 medium-chain stores

Adjusted Draw Area**Reasons for Adjusting Draw Area:**

The Los Angeles River forms a barrier to the north of the store and the Southern Pacific R.R. a barrier to the south.

Estimated Population:

Within 1.5-mile radius	9,000
Within 2-mile radius	12,300

Major Competing Stores:

Within 1.5-mile radius	None
Within 2-mile radius	None

7. Shopping Bag (unscheduled)**Theoretical Draw Area:****Description:**

This store was to be located in Granada Hills near the intersection of San Fernando Mission Blvd. and Balboa Blvd. Upon further consideration, Von's has decided not to open a store at this location. The lease has been assigned to Food Giant which is now operating a store there. The position where the store was to be situated is bounded on the east by Bull Creek and on the west by Aliso Canyon Wash which are 1 mile and 1.5 miles distant, respectively, from the store site. Bull Canyon extends into the theoretical draw area on the north.

Estimated Population:

Within 1.5-mile radius	34,600
Within 2-mile radius	43,600

Major Competing Stores:

Within 1.5- and 2-mile radii	1 larger-chain store
	1 Von's
	1 smaller-firm store

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

Bull Creek and Aliso Canyon Wash are barriers which decrease the size of the theoretical draw area.

Estimated Population:

Within 1.5-mile radius	27,300
Within 2-mile radius	26,000

Major Competing Stores:

Within 1.5- and 2-mile radii	1 larger-chain store
	1 smaller-firm store

B. Analysis of Overlapping Trade Areas.**1. Von's No. 22 and Shopping Bag No. 39****Theoretical Draw Area:****Description:**

The 1.5-mile overlap area is 2.5 miles long and 1.25 miles in depth. The 2-mile overlap area is 3.75 miles long and 2.25 miles in depth. Both areas are divided into thirds by the Los Angeles River and Wilbur Wash. A line of the Southern Pacific R.R. passes through this 2-mile area and intersects with the 1.5-mile overlap area and the latter's southeast corner.

Estimated Population:

Within 1.5-mile zone	16,400
Within 2-mile zone	39,650

Major Competing Stores:

Within 1.5-mile zone	1 larger-chain store
	2 medium-chain stores
Within 2-mile zone	4 larger-chain stores
	2 medium-chain stores

Adjusted Overlap Area:

None.

General Observations:

The Los Angeles River and the Wilbur Wash are barriers which tend to impede potential customers from going to adjacent areas. The barriers provide a separation between the subject stores.

2. Von's (planned in Canoga Park) and Shopping Bag No. 39**Theoretical Overlap Area:****Description:**

The 1.5-mile overlap area is 1.5 miles long and 0.5 mile in depth and is situated between Wilbur Wash and Browns Creek. The 2-mile overlap area is 3.25 miles long and 1.5 miles in depth. The Los Angeles River, Wilbur Creek and Calabasas Creek run through the 2-mile overlap area.

Estimated Population:

Within 1.5-mile zone	5,000
Within 2-mile zone	24,600

Major Competing Stores:

Within 1.5-mile zone	1 larger-chain store
	1 medium-chain store
Within 2-mile zone	1 larger-chain store
	1 medium-chain store

Adjusted Overlap Area:

None.

General Observations:

The waterways form barriers separating the subject stores.

3. Von's (planned in Northridge at Nordhoff Street and Woodley Avenue) and Shopping Bag (unscheduled * in Granada Hills).

Theoretical Overlap Area:

Description:

The 1.5-mile overlap has dimensions 1.25 by 0.25 miles.
The 2-mile overlap has dimensions 3 by 1.25 miles.
Bull Creek passes through both overlap areas.

Estimated Population:

Within 1.5-mile zone	1,600
Within 2-mile zone	13,600

Major Competing Stores:

None.

Adjusted Overlap Area:

None.

General Observations:

Bull Creek is a barrier which separates the theoretical overlap areas.

* Not opened. Food Giant operating a store at this location now.

**4. Von's (planned in Granada Hills) and Shopping Bag
(unscheduled * in Granada Hills).**

Theoretical Overlap Area:

Description:

The 1.5-mile overlap area is 2.75 miles long and 2 miles in depth. The 2-mile overlap is 3.75 miles long and 3 miles in depth. Bull Creek runs through both overlap areas and between the two stores. Both zones are bisected by San Fernando Mission Boulevard.

Estimated Population:

Within 1.5-mile zone	20,000
Within 2-mile zone	33,600

Major Competing Stores:

Within 1.5-mile zone	1 larger-chain store
Within 2-mile zone	2 larger-chain stores

Adjusted Overlap Area:

None.

General Observations:

Bull Creek is a barrier which separates the two stores.

* Not opened. Food Giant operating a store at this location now.

5. Von's (planned in Northridge at Nordhoff Street and Reseda Blvd.) and Shopping Bag (unscheduled* in Granada Hills).

Theoretical Overlap Area:

Description:

There is no 1.5-mile overlap area. The 2-mile overlap area is 2.25 miles long and 0.75 mile in depth. The Aliso Canyon Wash crosses the overlap area on the northwest.

Estimated Population:

Within 2-mile zone	3,000
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Major Competing Stores:	None
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Adjusted Overlap Area:

Reason for Adjusting Overlap Area:

The Aliso Canyon Wash is a barrier to the northwest section of the theoretical overlap area.

Estimated Population:

Within 2-mile zone	2,400
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Major Competing Stores:	None
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General Observations:

Most of the area is uninhabited. The inhabited section has much better access to the Shopping Bag store; however, one and probably two other stores in the draw area of the Shopping Bag store would be more convenient to a number of customers because of the street pattern.

* Not now planned to be opened.

6. Von's (planned in Northridge at Nordhoff Street and Reseda Boulevard) and Shopping Bag No. 39

Theoretical Overlap Area:

Description:

There is no 1.5-mile overlap area. The 2-mile overlap area is 2.0 miles long and 0.5 miles in depth. Wilbur Wash runs through the 2-mile overlap area.

Estimated Population:

Within 2-mile zone 3,800

Major Competing Stores:

None.

Adjusted Overlap Area:

None.

Reason:

Wilbur Wash is a barrier which separates the two stores.

General Observations:

The Wilbur Wash divides the theoretical overlap area approximately in the middle. Furthermore, there are eight competing stores within the 1.5-mile draw area of the Shopping Bag store and four competing stores within the 1.5-mile draw area of the Von's store.

V. The Garden Grove Area

(Map—Exhibit —)

A. Analysis of Trading Areas

1. Von's No. 26

Theoretical Draw Area:

Description:

Located in Garden Grove at 12151 Brookhurst Ave. near the intersection of Chapman Ave. The store is in the heart of a populated residential area. The Pacific Electric R.R. crosses Brookhurst Ave. in a northwest to southeast direction 0.25 mile south of the store. Another Pacific Electric branch runs 1.5 miles north of the store. A branch of the Southern Pacific R.R. is located at the western edge of the 2-mile draw area.

Estimated Population:

Within 1.5-mile radius	51,500
Within 2-mile radius	87,500

Estimated Number of Dwelling Units:

Within 1.5-mile radius	15,400
Within 2-mile radius	24,700

Major Competing Stores:

Within 1.5-mile radius	5 larger-chain stores 1 Shopping Bag 2 medium-chain stores 1 smaller-firm store
Within 2-mile radius	9 larger-chain stores 1 Shopping Bag 2 medium-chain stores 2 smaller-firm stores

Adjusted Draw Area:

Reasons for Adjusting Draw Area:

The Southern Pacific line that bounds the 1.5-mile draw area on the north constitutes a barrier; the Pacific Electric line which essentially bisects the entire drawing area constitutes a partial barrier.*

Estimated Population:

Within 1.5-mile radius	42,290
Within 2-mile radius	53,030

Estimated Number of Dwelling Units:

Within 1.5-mile radius	12,370
Within 2-mile radius	15,370

Adjusted Draw Area:**Major Competing Stores:**

Within 1.5-mile radius	4 larger-chain stores 1 Shopping Bag 1 medium-chain store 1 smaller-firm store
Within 2-mile radius	6 larger-chain stores 1 Shopping Bag 1 medium-chain store 1 smaller-firm store

* Population and dwelling units in the area beyond the Pacific Electric Railroad tracks were computed as follows:

- a. It was assumed that the core of business does not extend beyond the 1.5-mile radius;
- b. Half of the estimated population within 1.5 miles from the store were assumed potential customers.

2. Shopping Bag No. 33

Theoretical Draw Area:

Description:

Located in Anaheim at 9922 Katella Ave. near the intersection of Brookhurst Ave. One branch of the Pacific Electric R.R. is located 0.25 miles to the north while another branch is located 1.25 miles to the south. These two lines intersect at the western edge of the 2-mile draw area. The Santa Ana Freeway is located on the northeast edge of the 2-mile draw area.

Estimated Population:

Within 1.5-mile radius	55,920
Within 2-mile radius	90,530

Estimated Number of Dwelling Units:

Within 1.5-mile radius	15,710
Within 2-mile radius	25,550

Major Competing Stores:

Within 1.5-mile radius	6 larger-chain stores 1 Von's
Within 2-mile radius	7 larger-chain stores 1 Von's 1 medium-chain store 1 smaller-firm store

Adjusted Draw Area:

Reasons for Adjusting Draw Area:

One line of the Pacific Electric R.R. forms a barrier for potential customers in the 2-mile draw area to the southwest. The Santa Ana Freeway at the edge of the 2-mile draw area to the northeast forms a barrier.

Estimated Population:

Within 1.5-mile radius	54,510
Within 2-mile radius	85,090

Estimated Number of Dwelling Units:

Within 1.5-mile radius	15,350
Within 2-mile radius	23,190

Major Competing Stores:

Within 1.5-mile radius	6 larger-chain stores 1 Von's
Within 2-mile radius	6 larger-chain stores 1 Von's 1 smaller-firm store

B. Analysis of Overlapping Trade Areas**1. Von's No. 26 and Shopping Bag No. 33****Theoretical Overlap Area:****Description:**

The 1.5-mile overlap area has a length of 2.5 miles and a depth of 1.75 miles. Both stores are located within the 1.5-mile overlap. The two Pacific Electric R.R. lines lie within the overlap area. The 2-mile overlap area is 4 miles in length and 2.75 miles in depth.

Estimated Population:

Within 1.5-mile zone	30,780
Within 2-mile zone	57,330

Estimated Number of Dwelling Units:

Within 1.5-mile zone	9,170
Within 2-mile zone	16,000

Major Competing Stores:

Within 1.5-mile zone	3 larger-chain stores
Within 2-mile zone	4 larger-chain stores 1 medium-chain store 1 smaller-firm store

Adjusted Overlap Area:**Reasons for Adjusting Overlap Area:**

The 1.5-mile adjusted overlap is for all practical purposes the same as the 1.5-mile theoretical overlap. For the adjusted 2-mile overlap the Pacific Electric R.R. line on the north is assumed to be a complete barrier.

Estimated Population:

Within 1.5-mile zone	30,780
Within 2-mile zone	47,520

Estimated Number of Dwelling Units:

Within 1.5-mile zone	9,170
Within 2-mile zone	12,990

Major Competing Stores:

Within 1.5-mile zone	3 larger-chain stores
Within 2-mile zone	4 larger-chain stores
	1 medium-chain store

General Observations:

In the 1.5-mile adjusted overlap area about half the customers are as close, or closer, to other larger-chain stores, and about a fourth of the customers will likely be drawn by another market on the way to the subject stores.

In the 2-mile adjusted overlap area, potential customers west of Brookhurst Ave. who use the most convenient avenues of approach leading to the Von's store could be intercepted by another store. In addition, potential customers in the eastern part of the zone are as close (and in some cases, closer) to 3 other larger-chain stores (just outside the zone) as they are to the subject stores.

VI. The Whittier Area:

(Map—Exhibit—)

A. Analysis of Trading Areas.

1. Von's No. 27

Theoretical Draw Area:

Description:

Located in E. Whittier at 15740 Whittwood Lane, near Whittier Boulevard. A large unpopulated area exists to the north, starting about 0.5 miles from the store. The Pacific Electric R.R. runs through a portion of the draw area 0.5 mile south of the store.

Estimated Population:

Within 1.5-mile radius	30,100
Within 2-mile radius	51,700

Estimated Number of Dwelling Units:

Within 1.5-mile radius	8,260
Within 2-mile radius	20,100

Major Competing Stores:

Within 1.5-mile radius	4 larger-chain stores
	1 smaller-firm store
Within 2-mile radius	7 larger-chain stores
	1 Shopping Bag
	2 medium-chain stores
	2 smaller-firm stores

Adjusted Draw Area:

Reasons for Adjusting Draw Area:

The railroad limits access to the store from the South. Valley Home Avenue, a main road, and lack of a convenient east-west access limits the draw area to that section west of Valley Home Avenue.

Estimated Population:

Within 1.5-mile radius	22,900
Within 2-mile radius	29,200

Estimated Number of Dwelling Units:

Within 1.5-mile radius	6,100
Within 2-mile radius	8,200

Major Competing Stores:

Within 1.5-mile radius	4 larger-chain stores
Within 2-mile radius	4 larger-chain stores

2. Shopping Bag No. 1**Theoretical Draw Area:****Description:**

Located in La Habra at 1611 W. Whittier Blvd. near Hacienda Road. The population of the theoretical draw area is concentrated into an area approximately 0.75 mile north and south of Whittier Blvd.

Estimated Population:

Within 1.5-mile radius	33,300
Within 2-mile radius	42,600

Estimated Number of Dwelling Units:

Within 1.5-mile radius	9,800
Within 2-mile radius	12,700

Major Competing Stores:

Within 1.5-mile radius	4 larger-chain stores
Within 2-mile radius	6 larger-chain stores
	1 Von's
	1 smaller-firm store

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

The Pacific Electric R.R. 0.75 mile south of the store limits access from the south; hills exist about 0.75 mile to the north. A main road, Valley Home Avenue, and lack of convenient east-west access, limits the draw area to the west at Valley Home Avenue.

Estimated Population:

Within 1.5-mile radius	19,300
Within 2-mile radius	20,300

Estimated Number of Dwelling Units:

Within 1.5-mile radius	5,200
Within 2-mile radius	6,000

Major Competing Stores:

Within 1.5-mile radius	3 larger-chain stores
Within 2-mile radius	4 larger-chain stores

3. Shopping Bag No. 22**Theoretical Draw Area:****Description:**

Located in Whittier at 1183 Quad Way near Painter Avenue. Store is centered in a heavily populated area near the intersection of two main roads (Painter Ave. and Whittier Blvd.) Two branches of the Pacific Electric R.R. run to the south and west of the store; the northern branch nearly bisects the area, coming within 0.25 mile southwest of the store.

Estimated Population:

Within 1.5-mile radius	48,800
Within 2-mile radius	57,900

Estimated Number of Dwelling Units:

Within 1.5-mile radius	14,900
Within 2-mile radius	18,300

Major Competing Stores:

Within 1.5-mile radius	4 larger-chain stores 1 medium-chain store 1 smaller-firm store
Within 2-mile radius	7 larger-chain stores 1 medium-chain store 1 smaller-firm store

Adjusted Draw Area:**Reasons for Adjusting Draw Area:**

The railroad limits access to the store from the west and south. Location of other stores north of Whittier Boulevard, and the traffic barrier presented by the Boulevard confines the draw area to the south of the Boulevard. A small area south of the railroad is included, however, because of absence of other stores there.

Estimated Population:

Within 1.5-mile radius	13,900
Within 2-mile radius	16,100

Estimated Number of Dwelling Units:

Within 1.5-mile radius	4,000
Within 2-mile radius	4,600

Major Competing Stores:

Within 1.5-mile radius	1 smaller-firm store
Within 2-mile radius	1 smaller-firm store

B. Analysis of Overlapping Trade Areas.

1. Von's No. 27 and Shopping Bag No. 1

Theoretical Overlap Area:

Description:

The 1.5-mile overlap area is 2.5 miles in length by 1.25 miles in depth. The 2-mile overlap area is 3.25 miles in length by 2.25 miles in depth. The Pacific Electric R.R. passes through both overlap areas. Whittier Boulevard runs east and west through the overlap area.

Estimated Population:

Within 1.5-mile zone	10,600
Within 2-mile zone	13,740

Estimated Number of Dwelling Units:

Within 1.5-mile zone	2,900
Within 2-mile zone	5,350

Major Competing Stores:

Within 1.5-mile zone	1 larger-chain store
Within 2-mile zone	4 larger-chain stores
	1 smaller-firm store

Adjusted Overlap Area:

Reasons for Adjusting Overlap Area:

The 1.5- and 2-mile overlaps are characterized by a hilly area which naturally shunts the hill customers either to the Shopping Bag area or to the Von's area. The Pacific Electric R.R. forms a barrier to the south.

Estimated Population:

Within 1.5-mile zone	10,600
Within 2-mile zone	13,400

Estimated Number of Dwelling Units:

Within 1.5-mile zone	2,900
Within 2-mile zone	5,200

Major Competing Stores:

Within 1.5-mile zone	1 larger-chain store
Within 2-mile zone	4 larger-chain stores

General Observations:

Due to the lack of good east-west through streets, the main traffic artery is Whittier Boulevard where intervening stores are located. There are a number of other stores in the immediate vicinity of the Von's and Shopping Bag stores.

2. Von's No. 27 and Shopping Bag No. 22**Theoretical Overlap Area:****Description:**

The 1.5-mile overlap area is 1.75 miles long and 0.5 mile in depth. The 2-mile overlap area is 3.25 miles long and 1.5 miles in depth. The Puente Hills lie to the north of the overlap areas. About 20% of the overlap area is to the south of the Pacific Electric R.R. Whittier Boulevard runs roughly east and west and bisects the draw areas.

Estimated Population:

Within 1.5-mile zone	4,980
Within 2-mile zone	13,680

Estimated Number of Dwelling Units:

Within 1.5-mile zone	1,220
Within 2-mile zone	3,980

Major Competing Stores:

Within 1.5-mile zone	None
Within 2-mile zone	2 larger-chain stores 1 medium-chain store 1 smaller-firm store

Adjusted Overlap Area:**Reasons for Adjusting Overlap Area:**

The 1.5- and 2-mile overlap zones contain a sparsely populated area at the north end and, on the south, the Pacific Electric R.R. forms a barrier. Whittier Ave. is the only through street between the two stores.

Estimated Population:

Within 1.5-mile zone	3,500
Within 2-mile zone	6,900

Estimated Number of Dwelling Units:

Within 1.5-mile zone	800
Within 2-mile zone	2,100

Major Competing Stores:

Within 1.5-mile zone	None
Within 2-mile zone	2 larger-chain stores

General Observations:

1. The two subject stores serve a small overlapping group of potential customers.
2. Three other larger-chain stores all located on Whittier Blvd. between the two subject locations serve the same group of potential customers.
3. A lack of through-streets parallel to Whittier Blvd. between the two subject locations limits traffic between the stores.

Appendix II

Table 1

Merchandise Inventory Investment for a Typical Supermarket Producing \$1.7
Million Annual Volume

	Total Investment(1) (At Cost)	Operator's Estimated Cash Outlay Required
Meat.....	\$ 8,500	\$ 8,500(A)
Produce.....	2,000	2,000(A)
Groceries and nonfoods.....	57,000	— (B)
Frozen foods.....	2,000	— (B)
Dairy.....	5,300	5,300(A)
Baked goods.....	700	700(A)
Total.....	<u>\$75,500</u>	<u>\$16,500</u>

(1) Total inventory investment amount and breakdown into meat, produce and a total for the four remaining merchandise groups are from: Calvet M. Hahn, "What Will It Cost To Open A New Supermarket in 1961?", Chain Store Age, December 1960, Pg. 38 et seq. The total of \$65,000 for the four remaining merchandise groups was distributed by individual merchandise group on the basis of the distribution of items in these groups given in "The Dillon Study", Progressive Grocer, N.Y., (a collection of reprints of seven articles published from May to November 1960, Pg. D74) after adjustment to a cost basis on the basis of the gross margin given for each group.

(A) A reduction in the cash outlay required might be expected from the following:

About 40% of meat inventory consists of semipерishable meats, such as smoked, cured, processed and preserved meats ("12th Annual Consumer Expenditures Study", Food Topics; N.Y., Vol. 14, No. 15, September 1960, Pg. 74ff.). These are subject to credit terms from wholesalers, cooperatives and voluntary buying groups. The estimated reduction in cash outlay if semipерishable meats were bought on credit terms would be \$2,500.

Most dairy equipment, according to trade sources, is available on a "vending machine" loan basis, under which the supermarket would receive credit terms on dairy products.

Produce and baked goods are, according to trade sources, obtainable in some cases with credit terms.

(B) These classes of products would be expected to require no immediate cash payment as terms are generally available to cover at least one turnover of inventory.

Table 2

Estimated Equipment and Supplies Investment for a Typical Supermarket
Producing \$1.7 Million Annual Volume

	Total Investment(1)	Operator's Estimated Cash Outlay Required
Front end (checkstands, registers, carts and office).....	\$ 21,600	
Meat department.....	30,000	
Frozen foods and ice cream.....	9,800	
Dairy department.....	5,100	
Produce department.....	9,000	
Grocery, nonfoods, baked goods.....	20,700	
Total store equipment and supplies.....	\$ 96,200	\$38,500(2)
Truck.....	4,000*	800(3)
Grand total.....	<u>\$100,200</u>	<u>\$39,300</u>

(1) Calvet M. Hahn, "What Will It Cost To Open A New Supermarket in 1961?", Chain Store Age, December 1960, Pg. 38 *et seq.*

(2) On a 40% down-payment basis. If the dairy department equipment were to be supplied by the vendors the cash outlay for store equipment and supplies would be approximately \$36,400.

(3) On a 20% down-payment basis.

* Amount given in Chain Store Age, December 1960, *op cit.*, includes an item of \$12,000 for truck and trailer. This was reduced to \$4,000 to cover estimated cost of small truck for single store operator, who receives direct delivery from suppliers and does not require trailer-truck combination.

Table 3

Estimated Investment in Structural Additions and Improvements for a Typical Supermarket Producing \$1.7 Million Annual Volume

	Total Investment(1)	Operator's Estimated Cash Outlay Required
Floors.....	\$ 5,500	
Ceiling.....	3,000	
Front, doors.....	12,000	
Lighting.....	8,500	
Heating.....	4,500	
Sign, pylon.....	7,500	
Air conditioning.....	15,500	
Compressors.....	7,000	
Painting.....	2,400	
Labor and miscellaneous.....	25,000	
Refrigeration installation.....	13,000	
Total.....	<u>\$103,900</u>	<u>\$52,000(2)</u>

(1) Source: Calvet M. Hahn, "What Will It Cost To Open A New Supermarket in 1961?", Chain Store Age, December, 1960, Pg. 38 et seq.

(2) Estimated on a 50% down-payment basis.

Table 4

Pro Forma Annual Earnings of a Supermarket Producing \$1.7 Million Annual Volume

1. Sales		
11,000 square feet of selling area (out of a total of 16,000 square feet) producing \$32,700 a week for 52 weeks.....		\$1,700,000
2. Gross profit at 17.6% of sales(1).....		\$ 299,000
3. Expenses payable in cash.		
Store labor expense at 7.5% of sales(2).....	\$	128,000
Advertising and promotion at 1.0% of sales(3).....		17,000
Store supplies at 0.9% of sales(4).....		15,000
Store rent and real estate at 1.8% of sales(5).....		31,000
Heat, light and power at 0.5% of sales(6).....		9,000
All other at 1.9% of sales(7).....		32,000
Total.....	\$	232,000
4. Expenses not payable in cash		
Depreciation on equipment and additions(8).....	\$	12,000
Amortisation of improvements(9).....		10,000
Total.....	\$	22,000
5. Net operating profit before and after income tax		
Gross profit.....	\$	299,000
Expenses payable in cash.....	\$232,000	
Expenses not payable in cash.....	22,000	254,000
Net operating profit before tax.....	\$	45,000
Federal and state income taxes.....	\$	19,000
Net operating profit after tax.....	\$	26,000

(1) Based on typical gross profit of 18.3% of sales as reported by Super Market Institute Survey covering 1959 operating results and appearing in "Twenty-Eighth Annual Survey—Facts in Grocery Distribution", Progressive Grocer, N.Y., 1961 edition, Pg. F23. The gross profit percentage was reduced by .07 percentage point to present a more conservative estimate of the net profit potential. Gross profit as used above is the excess of sales over the actual cost of sales (merchandise).

(2) Based on Super Market Institute typical 1959 operating results as reported by Progressive Grocer (*op. cit.*). The typical store labor expense of 7.0% reported was increased by 0.5 percentage points to be more conservative in computing the estimated net profit.

(3) Based on Super Market Institute typical 1959 percentage as reported by Progressive Grocer (*op. cit.*). The reported typical advertising and promotion expense of 2.3% was reduced by 1.3 percentage points to be more representative of a single supermarket using more limited local advertising and promotion. Promotion expense includes tape plan and stamp plan costs.

(4) Based on Super Market Institute typical 1959 figure of 0.9% as reported by Progressive Grocer (*op. cit.*).

(5) Based on 1.8% figure for supermarkets leased from independent landlords as reported in "Facts About New Super Markets Opened in 1960", Super Market Institute, January 30, 1961, Pg. 12. Typical 1959 Super Market Institute figure is 1.2% for this item.

(6) Based on Super Market Institute typical 1959 figure of 0.5% as reported by Progressive Grocer (*op. cit.*).

(7) All other expenses include proprietor's salary, transportation, telephone, interest on outstanding indebtedness, taxes, freight charges and miscellaneous expenses. The typical figure reported by Super Market Institute as "all other expenses" covers three entries in the pro forma statement above: All other expenses, Depreciation and Amortization. (These were broken out separately to estimate cash generated.) The Super Market Institute figure reported was 4.3%, this was adjusted downward by 1.1 percentage points to 3.2% to make it more representative of a single supermarket with no separate warehouse and a smaller operating overhead. Depreciation and amortization (see notes 8 and 9 below) were estimated on the basis of the initial investment, and the difference between this amount and 3.2% of sales was entered as "all other expenses" in the pro forma statement above.

(8) Equipment and certain structural additions involving an initial investment of about \$120,000 were depreciated on a 10-year straight-line basis.

(9) Structural improvements involving an initial investment of about \$90,000 were amortized on an 8-year straight-line basis.

[fol. 1]

DEFENDANTS' EXHIBIT BF

IN THE UNITED STATES DISTRICT COURT

No. 336-60-CC

[Title omitted]

Deposition of ROY LAWRENCE BOUQUE, taken on behalf of the Plaintiff, at Room 806, Federal Building, Los Angeles, California, commencing at 2:00 P.M., Tuesday, May 28, 1963, before Harold M. Leibovitz, C.S.R., Notary Public, pursuant to oral stipulation.

[fol. 2] APPEARANCES OF COUNSEL:

For the Plaintiff: James J. Coyle, Esq. and John F. Hughes, Esq. Attorneys for the U. S. Department of Justice

Antitrust Division, 1602 Federal Building, Los Angeles, California.

For the Defendants: Johnson, Bates & Sheffield, Esq. and O'Melveny & Myers, Esqs.

William W. Alsup, Esq. and William M. Vaughan, Esq.

By: William W. Vaughan, Esq.

433 South Spring Street, Los Angeles, California.

(Also Present: Prof. William F. Brown).

[fol. 3] ROY LAWRENCE BOUQUE, having been first duly sworn, deposed and testified as follows:

Direct examination.

By Mr. Coyle:

Q. Mr. Bouque, would you please state your full name and address for the record, please.

A. Roy Lawrence Bouque. Business address is 545 South Spring Street, Los Angeles, California.

Q. Are you a partner in the firm of Lybrand, Ross Bros. & Montgomery?

A. I am.

Q. How long have you been a partner in this firm?

A. I have been a partner about one year.

Q. How many partners does this firm have?

A. Being a national firm I don't know offhand how many there are throughout the nation. There are 12 in the local office.

Q. How many people are there in the local office?

A. There are 140 persons in the local office.

Q. Are there various classes and types of partners? Are there senior partners and junior partners?

A. No. The partnership is based—There is a regional partner by title who is responsible for the [fol. 4] activities in the Western Region. There is a partner designated from among the partners in the local office as partner-in-charge of the office to handle administrative problems. Then the remaining partners handle their particular clients.

It so happens that we do have a differentiation in that we have those partners who devote their time to the audit side of our activities and there are two partners in the office, one of whom is myself, that devote our time exclusively to the management and consulting phases of our activities.

Q. Would it be fair to characterize you as a management consulting partner?

A. Well, I am a partner in the firm of Lybrand and my activities are devoted to management consulting.

Q. What were you prior to approximately a year ago when you became a partner?

A. I was a manager in the Management Consulting Division of Lybrand's in Los Angeles.

Q. Do you have any central research staff in Los Angeles?

A. We do not have a central research staff in Los Angeles. If you mean by "central research staff," do we have Ph.D.'s and things of that nature in the local staff, we do not.

Q. Where is your central research staff?

[fol. 5] A. The central research staff is in New York.

Q. Did the central research staff direct and control the study which you embodied in your affidavit?

A. The way the engagement was operated was that Dr. Tibor Fabian was in overall charge of the engagement from the central research staff. He had working for him a consultant from the New York central research staff and three men from the local Los Angeles staff. In turn these men reported administratively to the partners in the Los Angeles office.

Q. Who were the three men who were working locally?

A. The three men were Herb McLanahan, I believe Harry Heath and Nelson Gilbert or Gilbert Nelson. I have forgotten what the sequence is between those two names.

I might add that I did not participate in the initial phases of this particular study. I was on another engagement at the time. However, since then I have reviewed the working papers and report and familiarized myself with the facts and conclusions drawn.

Q. When did you first become associated with this project?

A. It was in the fall of 1961 when I first got into phases of the engagement.

Q. When had the field work been completed?

A. What field work are you referring to?

Q. Was there any field work done in connection with [fol. 6] this project?

A. Can you define what you mean by field work so I understand?

Q. You describe to me what sort of work was done in preparing this study.

Mr. Vaughn: May I say that it is broken down into three phases and I think you will get better answers if you refer to one phase and the other phase and the other phase. It is broken down in the affidavit.

Mr. Coyle: I will withdraw that question and come to it later.

Q. You mentioned a consultant in New York. What was his name?

A. Seymour Kwerel.

Q. Is he employed by someone other than Lybrand, Ross Bros. & Montgomery?

A. At the time he was employed by Lybrand, Ross Bros. & Montgomery. He is no longer with the firm.

Q. He was a full-time employee?

A. He was a full-time employee.

Q. Where is he now?

A. I couldn't say. I don't know.

Q. You say in 1960 Lybrand was asked by the attorneys for Von's Grocery Company to make an analysis and study of certain aspects of the retail grocery business. When in 1960 was this request made?

[fol. 7] A. I would have to refer exactly to records but it was sometime right around July, as I recall.

Q. When was this analysis and study completed?

A. The field work—Well, here I am getting into some timing of dates and precisely which I cannot give you the exact timing on this thing. The field work was done during the fall of 1960 and the actual date of the report I can't recall.

Q. Was it prior to the subsequent request in 1961? In other words, was it—

A. It was prior to that time.

Q. Was it completed prior to the 1961 request?

A. That is correct.

Q. When was the 1961 request made?

A. This was made about August or September for a followup, an updating of the data because of the time lag between the initial study and the deferment of the trial and they wanted the data brought up to date.

Q. Was there any work done as a result of the 1961 request other than the updating of the work done in 1960?

A. It was primarily the updating but it was the covering of the new aspect of the importance of discount stores that was brought into the picture.

Q. And that was the only work that was done in 1961 other than updating the 1960 work?

A. There were a few charts and so forth, an [fol. 8] interpretation that we developed subsequent.

Q. Which were they?

A. They were the exhibits included in the data presented to the government.

Q. Which exhibits?

A. I would have to refer to that to give you the exact number of the exhibits.

Mr. Vaughn: May I ask him if these are the exhibits to which he refers?

Mr. Coyle: Yes.

The Witness: These are the exhibits to which I referred.

Mr. Coyle: Q. Were they based on work which you had done in 1960?

A. Well, this is based on work done in 1960 and '61, both.

Q. Is it correct then to say that other than these exhibits, which I will describe as an exhibit entitled "Percentage of the total grocery store sales by various groups of chains in the Los Angeles metropolitan area, 1950-1961" and "Percentage of total grocery store sales by various groups of chains in the Los Angeles metropolitan area, 1950-1960," the first one being a table and the other a graph. And a third document entitled "Comparison of sales from 1948 to 1960 of the 20 largest grocery chains in the Los Angeles metropolitan area, using June 30, 1960 ranking."

In addition to these exhibits and the portion of [fol. 9] your affidavit dealing with discount houses the balance of your report is based upon work which was done in 1960, except that it was brought up to date in 1961?

A. There was one further exhibit which I believe has been submitted entitled "Comparison of the number of stores and the 1960 sales of Von's and Safeway in the Los Angeles metropolitan area."

Q. Is that an additional exhibit?

A. Yes.

Mr. Vaughn: Actually that is set forth in the affidavit, but it was part of, I believe, the work done in 1961.

Is that correct?

The Witness: This statement last referred to was developed in 1961.

Mr. Coyle: Q. How long have you been doing management consulting work?

A. I have been doing it for about nine-ten years.

Q. What is your background in the field, your academic background?

A. My academic background is a Master's in business from Stanford University, Palo Alto.

Q. Have you done any market survey or market study work involving questioning respondents or questioning consumers to determine their shopping habits in that period?

A. I have not been in this particular area. I have participated in economic and marketing type surveys in [fol. 10] my career.

Q. But none in this area?

A. Not for particular grocery chains and things of this kind, sir.

Q. On Page 2 of your affidavit you state, "... we assumed that each store had a possible trading area of from one and a half to two miles, and accordingly, we made an analysis of each of the stores in question based on a possible or theoretical draw area of one and a half miles and another possible or theoretical draw area of two miles."

Was this assumption made prior to the time that you participated in this survey? Was this assumption made in 1960 when the field work was done?

A. That is correct.

Q. You yourself made no survey or no study or no market study in connection with the field work that was done in 1960 because you weren't associated with the project at that time; is that correct?

A. Since the time I have become involved in the particular study and under discussion here I have reviewed the working papers, familiarized myself with the report, reviewed the conclusions that were drawn, the assumptions made, and am in complete concurrence with the facts as drawn by our staff at the time and as presented in the affidavit.

Q. Who made the original assumption that there was a possible trading area of from one and a half to two miles? [fol. 11] Was this done in New York?

A. As to the individual who made this particular decision I would assume it was made on the basis of a team

operation. This is the way we do our work. That you have the man in charge, who is a principal in the firm, or a partner, the supervisor on the job and the other staff men. And based on the facts that they gather from observation, from talking to people in the field, from reading other survey reports or periodicals, from these facts they develop their conclusions and make their assumptions.

Q. You say, "It is generally believed by retailers . . ." How many retailers were interviewed in connections with this project?

A. I am not familiar with the exact number of retailers they discussed this with.

Q. Do you know whether they had a sample or made a survey?

A. I know that they talked with various retailers about this during the course of the examination.

I know the staff was out making interviews. Now, the exact number I don't know. Certain interviews were made by Dr. Fabian and Seymour Kwerel.

Q. Is Dr. Fabian from New York?

A. Dr. Fabian is also from New York.

Q. And he is employed by Lybrand, Ross Bros. & Montgomery?

[fol. 12] A. He was employed. He is no longer with the firm at this time.

Q. You state that you familiarized yourself with their records. How many retailer interviews have you read that they made? Did they make reports of these retailer interviews?

A. None that I am aware of. There is such a mass of data that it fills a couple of file drawers—three file drawer cabinets.

Q. In that familiarizing yourself with their working papers you never ran across any reports of retailer interviews that they had made?

A. No, I did not.

Q. You say, "It is generally believed by retailers and other authorities . . ." and cite Richard L. Nelson. What other authorities did Dr. Fabian rely upon when he determined the market area?

A. I am not sure. I don't know all that he relied upon

but I do know that a couple of those involved would have been Facts Consolidated.

Q. That is Dorothy Corey?

A. Dorothy Corey. And also This Week I believe made a study in which they——

Q. What is "This Week"?

A. It is the periodical that comes out in the various newspapers. It is sort of a magazine type section to your [fol. 13] Sunday paper.

Q. Which edition?

Mr. Vaughn: You are interrupting him and not permitting him to finish his answers.

Mr. Coyle: I am sorry.

The Witness: You will have to read back to me what I said. I don't recall where I was.

(The reporter read the record commencing on Page 12, Line 14 to and including Page 12, Line 23.)

The Witness: A study was made by the staff of this particular magazine in which they indicated in this survey that the normal draw area was from one and a half to two miles for a supermarket.

Mr. Coyle: Q. This was in a Sunday supplement of a newspaper?

A. This was a particular survey that was made that was reported by them.

Mr. Vaughn: Mr. Bouque, before Mr. Coyle interjected the words "Dorothy Corey," had you finished your answer about Facts Consolidated?

The Witness: Here again I don't recall the exact wording where I was cut off.

Mr. Coyle: Do you want the question read back to him, Mr. Vaughn?

Mr. Vaughn: Maybe he can just repeat whatever it was [fol. 14] that he was about to say about Facts Consolidated or whatever he did say.

The Witness: Can you read that back to me so I can see what I said.

(The reporter reread the record commencing on Page 12, Line 14 to and including Page 12, Line 23.)

The Witness: Regarding Facts Consolidated, Dr. Fabian was familiar with the data, which based on account of the individuals patronizing the store indicated that the primary draw area or the bulk of the people drawn into a store were from a mile and a half to two miles away.

Mr. Coyle: Q. This is material which Facts Consolidated prepared for Von's Grocery, is it?

A. That is correct.

Q. Dr. Fabian discussed the matter with Mrs. Corey, did he?

A. I am not aware whether he discussed it with her or just read the report.

Q. Have you ever discussed it with her?

A. I have not.

Q. Have you read her reports?

A. I have scanned portions of the report that applied to the bulk of the customers coming from this range of a mile and a half to two miles.

Q. Have you looked at her work papers?

[fol. 15] A. Only the report.

Q. As far as you are concerned it is just her work and you don't know whether it is accurate or not, you are just assuming that it is accurate; is that correct?

A. I would assume that the work prepared by her was accurate.

Q. This article in This Week—Is This Week a national publication?

A. Let me mention something here, or reiterate, that I am not familiar with the various ones that Dr. Fabian referred to at the time he made this decision. I know that This Week has an article, the exact timing of when this article was issued I don't recall offhand. But this study was made by the staff of This Week and was issued in a brochure which I have screened.

Q. And those are the only authorities that you relied upon to draw this conclusion?

Mr. Vaughn: That assumes facts not in evidence and I object to it on that ground.

Mr. Coyle: Q. What other authorities did Dr. Fabian rely upon to conclude that you should use the one and a half to two miles?

A. I am not familiar with this. I would have to, if you wish, search the records and get the additional source that he relied upon, but I do not know them offhand.

Q. In your search of his records you can't recall any [fol. 16] other sources? You said you had searched his records.

A. I have reviewed his records but because of the mass of data I cannot recall all of the means, numbers and people contacted, periodicals reviewed and the like. It is too much.

Q. How long was Dr. Fabian with the Lybrand firm?

A. I do not know how long Dr. Fabian was with them. He was with the firm prior to my coming with the firm, I believe. But it was a number of years that he was with Lybrand.

Q. How long have you been with the firm?

A. Three and a half years.

Q. Where were you before you came with the firm?

A. I was with Booz, Allen & Hamilton, management consultants, prior to that time.

Q. Were you in their Chicago office?

A. I was in their Los Angeles office, Seattle, and worked in the Philippines for three years.

Q. How long were you in the Los Angeles office prior to coming to Lybrand, Ross Bros. & Montgomery?

A. I moved from the Seattle office to Los Angeles and stayed in the Los Angeles office just a matter of a few days before I transferred—moved to Lybrand.

Q. So that you have really only been down in this area about three and a half years; is that correct?

A. No. I worked for Booz, Allen & Hamilton in—I joined them in 1954 and worked for them in Los Angeles [fol. 17] prior to going to the Philippines.

Q. Specifically what date did you come to work with Lybrand, Ross Bros. & Montgomery?

A. I came to work for them in October 1959.

Q. So far as you know was Dr. Fabian's work generally in the New York area?

A. Dr. Fabian's work covered the entire United States. As a central research staff he was called to do engagements throughout the United States.

Mr. Vaughn: By the way, may I inquire of the reporter as to whether Dr. Brown's appearance is noted in the record.

The Notary: I show him as being "also present."

Mr. Coyle: Q. Was there an original draft of this report prepared prior to the time you became associated with this project?

A. Yes.

Q. Have you incorporated any of that draft into your report?

Mr. Vaughn: In his affidavit, you mean?

Mr. Coyle: Q. In your affidavit, yes.

A. Yes.

Q. Referring to Page 2 again, to the first full paragraph on Page 2, is that the language appearing in the original draft?

A. Original draft of the report?

Q. Yes. That was prepared prior to the time you came [fol. 18] on the project?

A. Without referring to the actual draft report, the affidavit has naturally reshaped and condensed a lot of the information that was given in the report. So as to exact wording, the context, the sense is there as given in the report.

Q. So it would be your testimony, then, that Dr. Fabian and Seymour Kwerel made this assumption of one and a half to two miles on what they assumed was generally believed by retailers and other authorities?

A. Yes, it was based on the data that they were able to gather through, as I understand it, interviews, reviews of other surveys of this nature.

Q. That is what you gather it was based upon?

A. Yes.

Q. On Page 3, Line 1, you say, "Next, we determined from census figures . . ." When you use the word "we," are you referring to Dr. Fabian and Mr. Kwerel and these other people who were on the project prior to the time you came on it?

A. We use the term "we" as the firm, "we did this." In other words, the firm stands behind the report and the affidavit.

Q. But these determinations were made prior to the time that you came on the project, were they not?

A. That is correct.

[fol. 19] Q. So grammatically it would be more proper to say, "they determined it"?

Mr. Vaughn: I object to the question as being argumentative. The witness has stated the fact and you are just arguing with him.

Mr. Coyle: I am just asking the question.

Q. Was it "we" or "they"?

A. As a partner in the firm, the firm is "we."

Q. But you were not a partner when this study was made.

A. No. This is terminology normally used in the firm.

Q. Not in affidavits.

Mr. Vaughn: I move to strike Mr. Coyle's remark about what should or should not be in an affidavit. It calls for an expert opinion, for which he is not qualified.

Mr. Coyle: Q. Now, on Line 8 in parentheses you say, "Except on a basis of personal preference which cannot be measured statistically." Is that your conclusion, that personal preference cannot be measured statistically?

A. The phrase is, "which cannot be measured statistically"?

Q. Yes. Is it your opinion that personal preference cannot be measured statistically?

Mr. Vaughn: I will object to the question as assuming facts not in evidence and contrary to the evidence. You have obviously taken a parenthetical phrase out of the [fol. 20] paragraph and out of context in order to ask that question. That is not what the import of the statement is.

Mr. Coyle: Maybe the witness can tell me what the import of the statement is.

Q. Do you mean to imply here that personal preference cannot be measured statistically?

Mr. Vaughn: I object on the same ground.

Mr. Coyle: Let him answer.

The Witness: What we are saying here is that our study

was a statistical analysis in large part and that in arriving at our conclusions we did not have a firm basis upon which to measure any personal preferences. Such as a particular housewife likes the looks of a store, or prefers for innumerable reasons as to why they would go to one store rather than another, it is difficult to arrive at a statistical measure of this.

Mr. Coyle: Q. But those personal preferences can be measured statistically, can they not?

A. I am not enough of a statistician to say positively that it would not be very difficult to evaluate this statistically.

Q. Do you base this conclusion on any authorities to the effect that these personal preferences cannot be measured statistically?

A. I am not aware of the authorities used by Dr. Fabian and his staff.

[fol. 21] Q. From your review of Facts Consolidated's studies did you draw any conclusion as to whether or not Facts Consolidated was attempting to measure these personal preferences statistically?

A. I think from a review of their charts and figures it was very clear to my mind that people have certain preferences when they will be residing near one store and will go some place else. But how do you read in an individual's mind as to why he wants to go to a particular store? Is it price, the store is clean, the particular manager they like, the sales people are courteous. A myriad of reasons why a person will go.

Q. Back on Page 2, on Line 4, the statement is made, "... that the vast majority of the customers of a typical supermarket in the Los Angeles metropolitan area live within two miles of the store." Can you tell us what the phrase "vast majority" means in terms of percentages?

A. Well, this percentage will range, but taking, for example, the Facts Consolidated report I think the number within these limits of one and a half to two miles indicated anywhere from 63 per cent up to 90 plus per cent, with an average of about 85 per cent.

Q. Is 63 per cent the vast majority?

A. It is a large majority, yes.

Q. And you made no studies of your own to determine where the vast majority of the customers lived?

[fol. 22] Mr. Vaughn: You mean interviews with customers?

Mr. Coyle: Yes. I am asking if he made any studies of his own.

The Witness: The purpose of our review was to—In other words, there are many ways to make a review and ours was assigned by our client to make a statistical approach to this particular problem by assuming what the draw range of a particular store was, based on prior surveys and interviews, facts we could garner to come to some assumptions which in our judgment were valid. Using these particular facts we drew the draw radii around the particular stores. And using these circles we then statistically determined what the extent of competition, if any, was between the particular stores.

So we did not interview any individual customers of a store. This was not within the scope of our survey.

Mr. Coyle: Q. And this was done by the two doctors before you became associated—

A. Plus the additional men from the Los Angeles office.

Q. And they reviewed the Dorothy Corey studies, the book by Richard L. Nelson and maybe they made some interviews but you haven't found any reports of any of those interviews. Is that correct?

Mr. Vaughn: I will object to the question as improperly summarizing the witness' testimony. You can't go back, Mr. Coyle, over 45 minutes of testimony and try to sum [fol. 23] up what the man has said. His testimony stands.

Mr. Coyle: I can ask this witness what this assumption is based upon.

Mr. Vaughn: I object to it as being asked and answered a couple of times.

Mr. Coyle: I will let him answer.

The Witness: Would you please restate that because I have lost track of it.

Mr. Coyle: Q. Can you review again for us what this

assumption of the one-and-a-half to two-mile draw area was made from?

A. The assumption of the one-and-a-half to two-mile draw range, my understanding, my interpretation from the report, from my conversations with the people involved in this particular original survey was that they based this on other reports, discussions with other retailers in order to arrive at this assumption which they made in their judgment as valid and then proceeded to make the analysis on that basis.

Q. With whom have you discussed this project who was engaged in the original work?

A. I have discussed this particular project with Tibor Fabian, and briefly with the other people involved.

Q. When did you discuss it with Tibor Fabian?

A. The principal time when I got involved in this was in 1961, at which time there was the updating survey. But [fol. 24] naturally when he was visiting the Los Angeles office to do this work, his dropping in to say hello, we discussed what was coming on. But really the facts were not discussed until I got involved in the survey in 1961.

Q. When you made this theoretical assumption that the draw area was between one and a half and two miles did you take into consideration that draw areas might vary depending upon the size of the store or the parking facilities available at a particular store?

Mr. Vaughn: I will object to your characterization of the assumption as a theoretical one. I don't know that that appears any place in the testimony and hence assumes facts not in evidence.

Otherwise you may answer the question, Mr. Bouque.

The Witness: The assumption that—I have to go back to my original statement that the assumptions were based on the judgement of Dr. Fabian and his staff, based on their review of prior reports, their studies and conversations with various people in the field. And they arrived at this conclusion that this was the proper area.

Mr. Coyle: Q. Regardless of the size of the store or the parking facilities of the store this would be the proper area for drawing a theoretical draw area?

A. Statistically they determined, based on their analyses

of other reports, which considered many different sizes of stores, these other particular studies, I assume [fol. 25] they made a review of various sizes. I mean they just took supermarkets, they are not all the same size. And from this they arrived at the fact that the majority of customers come from this area.

Now, I recognize that some people, because of personal preferences, will come from further away. But by the same token some people close to Von's may go further away to some little corner store or to a Thriftmart or any other market simply because they have a preference for going that way.

Q. So far as you know the only study you can name that they relied upon was Dorothy Corey's studies?

Mr. Vaughn: I object to the question as improperly summarizing the evidence and assuming facts contrary to the evidence. He talked about "This Week," too.

Mr. Coyle: Q. You just mentioned that Dr. Fabian had used this draw area to determine this one-and-a-half to two-mile range in order to determine his theoretical draw area on the basis of studies which he had reviewed. What studies are you able to name that you know he reviewed other than Dorothy Corey's studies?

A. Well, as I mentioned previously, I am not aware of all the studies involved. There was too much data for me to recall the documents that were reviewed.

It is mentioned right in the affidavit, Richard L. Nelson, 1958, Page 49, is one of the other studies referred [fol. 26] to by Dr. Fabian. And I am sure there were others. Plus, as I said before, discussions with people in the industry.

Q. You say you are sure there were others. Can you name any of the others?

A. For the fourth time I would have to say I do not know all the studies that they have used as a basis for their assumption. If necessary I will be glad to get a list of them for you.

Q. Can you name right now any studies that were used other than the two that you have mentioned?

A. Well, it is a definition of the term "study." I believe we mentioned Mr. Nelson, Facts Consolidated, and I

know it is referred to in This Week report. As I mentioned earlier I am not sure of the exact date of the This Week study.

Q. You don't know whether Dr. Fabian read that?

A. I know he read it.

Q. And that is a Sunday supplement to a newspaper, is it not?

A. It was a brochure prepared by people who work on This Week supplement. And I am not in a position to say whether it actually appeared in This Week's Sunday supplement or not.

Q. With respect to Richard L. Nelson what is his background in the field of market research?

A. I am not prepared to indicate what his particular [fol. 27] background is. I do not know offhand.

Q. Do you know whether he is an authority or not?

A. I am not competent to evaluate whether he is an authority. I assume, because Dr. Fabian is a skilled consultant, that he would use the data provided by people who are knowledgeable in the field that they are reporting upon.

Q. Now referring to Page 20 of your revised affidavit—

Mr. Vaughn: What do you mean by "revised affidavit"?

Mr. Coyle: The second affidavit as contrasted with the first.

Mr. Vaughn: You are talking about the document entitled "Affidavit of Roy L. Bouque" which we supplied to you. We supplied to you a previous one.

Mr. Coyle: I have two. I just want to make sure that I am talking about the second one.

Mr. Vaughn: All right.

The Witness: Page 20, Appendix I.

Mr. Coyle: Q. That is correct. You refer to Von's No. 4. How large a store is Von's No. 4 in square feet?

A. I do not know the exact square footage of the Von's Stores—of this particular store.

Q. Have you inspected this store?

A. I have not personally inspected this store.

Q. When you drew this theoretical draw area would

that draw area have a radius of two miles when you draw [fol. 28] the theoretical two-mile area?

A. Would you repeat the question?

Q. When you drew these theoretical draw areas around Store No. 4 would the two-mile draw area have a two-mile radius and the one-and-a-half-mile draw area have a one-and-a-half-mile radius?

A. That is correct. From the store.

Q. Then you state, "The Long Beach Freeway lies 1.5 miles to the west and northwest." How does the Long Beach Freeway affect your theoretical draw area?

Mr. Vaughn: Which one? We have two.

Mr. Coyle: Q. Either one. How does the Long Beach Freeway affect either of your theoretical areas?

A. Well, the Long Beach Freeway—I would have to refer to the map to be absolutely sure. But as long as the freeway is on the perimeter of the one-and-a-half-mile radii this would have little effect. I will retract that statement. The theoretical draw area is strictly a radius of one and a half or two miles from the store. The fact that the freeway is in it does not change the boundaries of the theoretical draw area.

Q. And within the 1.5-mile radius of the theoretical draw area around Von's Store No. 4 did you conclude that there were 58,300 residents?

A. Forgetting the Long Beach Freeway, one-and-a-half-mile radius from the store we computed the estimated [fol. 29] population to be 58,300 people.

Q. What source did you use to make that computation?

A. The source used is the census areas which had a population by segments or areas, shall we say, within the 1.5-mile radius.

Q. What census was used, that is what year census?

A. I would have to refer to the notes. I do not know offhand.

Q. Do you have your notes?

A. Not with me.

Q. Was this done before you came on the project?

A. This was done before I came on the project.

Q. You refer to it as an estimated population. How did you estimate the population from the census data?

A. We took the census data in a particular area, and assuming an even distribution, except when it was clearly evident that a particular locale was mountainous and people couldn't live there, and depending upon where the radii bisected a particular area and added up these particular census figures.

Q. Did the census tracts fit exactly on the three-mile radius—or the two-mile radii and the one-and-a-half-mile radii?

A. They didn't fit exactly on it. As I said, we had to assume a proportionate distribution in the census tract unless it was clearly indicated that it was a mountainous [fol. 30] area or it was completely empty, or there was a drainage basis, or things of this nature which precluded people from living evenly within a census tract.

Q. These judgments were made prior to the time you came on the project, were they not?

A. That is correct.

Q. Were any criteria set up to determine which were the mountainous and which were the drainage tracts and which were the areas where people would not be living?

A. It was clearly evident by looking at the particular maps—

Q. Which maps?

A. The maps which have been included as exhibits, on the table over there, are part of the maps that were referred to in developing this information.

Q. When you found that within a two-mile radius, or your predecessors found within a two-mile radius that there were 96,100 people living there; is that correct?

Mr. Vaughn: I will object to the question insofar as it refers to "the predecessors." Mr. Boque has said that he has reviewed the facts that his predecessors had to work with.

Mr. Coyle: Q. When you came on the project had a determination been made that within the two-mile radius there were 96,000 residents?

A. This first phase of the survey was completed before [fol. 31] I came on the project. But I, as indicated, reviewed and discussed this with the people, and in our normal practice, in management consultant, and many

other professions, you have a lot of subordinates that are doing a lot of other work, the detailed work, and based on your confidence in people they arrive at certain conclusions which you review and accept if you feel they are valid.

Q. But the procedures that were set up for doing this was prior to the time you came on the project.

A. That is correct.

(A short recess was taken.)

Mr. Coyle: Q. Mr. Bouque, referring again to Page 20 of the Appendix I, does this theoretical area represent the area in which between 60 and 90 per cent of the customers of a given store reside?

A. Which theoretical draw area are you referring to? There are two of them.

Q. The theoretical two-mile radius draw area.

A. Yes. From the facts as I know them the majority of the people that come from this two-mile radius would range anywhere from 60 to 90 plus per cent of the customers.

Q. So as many as 40 per cent of the customers might then reside outside of the theoretical draw area based upon your assumptions.

Mr. Vaughn: I object to the question as being argumentative and speculative.

[fol. 32] You may answer, however.

The Witness: Yes, it is possible that in some cases if the store was drawing 60 plus per cent of their people from a two-mile radius it is evident they would have to draw the balance of it outside the two-mile radius.

Mr. Coyle: Q. Now, you have in addition two estimated population figures showing estimated number of dwelling units. How were the estimated number of dwelling units ascertained?

A. That was drawn on the same basis as the estimated population, from the census tract figures.

Q. Do the census tract figures portray the number of dwelling units in a given area?

A. Yes, it does.

Q. Have you used census figures in the past in doing management work?

A. Yes, I have.

Q. Have you found them to be reliable?

A. Yes.

Q. Are they the best figures available for doing this type of work?

A. I think that is too broad a statement to say that they are the best figures. You have got to find out what you are searching for.

Q. Were there any other figures more reliable than these available to you?

Mr. Vaughn: I will object to that as assuming a fact [fol. 33] not in evidence. You are assuming that there is more than one source for this information.

Mr. Coyle: Q. Is there more than once source for this information?

A. Offhand I couldn't say what those sources might be.

Q. You don't know of any other sources, though, do you?

Mr. Vaughn: You mean for estimated population and estimated dwelling units?

Mr. Coyle: Yes.

The Witness: Well, there are estimates made by various people as to the population in the area. I have seen them in periodicals. The exact source I don't know. Some of them were probably drawn from census figures and then, projections based on the estimated numbers of people that have come in the area and things of this nature.

Mr. Coyle: Q. What are the census years? When was the last census taken, Mr. Bouque?

A. I don't know offhand. I can't say positively.

Q. Did you ever update any of the census material prepared as part of this project subsequent to the time that you became associated with it?

A. No.

Q. You refer on the top of Page 21 to "Major competing stores within 1.5-mile radius," and refer to three

[fol. 34] larger-chain stores. Does the word "larger" mean that they were larger than the Von's store in the area?

A. It means that the stores are a member of a chain of more than ten stores.

Q. And the one medium-chain store.

A. Is a chain that has four to ten stores.

Q. So far as you know is there any difference in size between any of these chain stores?

A. To my personal knowledge I do not know the various sizes of these particular stores. They are supermarkets but I do not know the exact store footage.

Q. Do you know the trading area of these stores?

A. This was not within the scope of our survey to determine the trading area of these particular stores.

Q. Do you know whether they would have a theoretical trading area of one and a half to two miles?

A. To make the type of study we did we approached their trading area on the same basis as we did for the Von's and Shopping Bag stores.

Q. Did Dr. Fabian assume that they had the same trading area as the Von's store to make this study?

A. I wouldn't be in a position of assuming what was in his mind at this point. However, based on the judgment that was exercised in the assumptions made from a valid basis in our estimate, we would assume that these stores would have the same draw area, one and a half to two [fol. 35] miles, whatever it might be.

Q. Did the Dorothy Corey studies or the Facts Consolidated studies, which you referred to, relate to the draw area of stores other than the Von's and Shopping Bag stores?

A. The portion of the report that I saw applied only to the Von's and Shopping Bag stores.

Q. Now referring to Line 7 of your affidavit, Page 21, you state, "The Long Beach Freeway forms a barrier at the border on the 1.5-mile zone on the west." Was that determination made prior to the time you became associated with this project?

A. As I stated before, this portion of the work was documented prior to my association with this study.

However, I have, again, reviewed material associated with the development of this report.

Q. Was a consumer preference study undertaken to determine whether the Long Beach Freeway forms a barrier at the border of the 1.5-mile zone?

Mr. Vaughn: By Lybrand?

Mr. Coyle: Yes.

The Witness: That was beyond the scope of our particular survey and we did not make a consumer preference study of this.

Mr. Coyle: Q. Did you resort to any consumer preference study as to this barrier?

[fol. 36] A. I cannot refer to my own knowledge as to specific studies that they referred to but I do recall conversations with them indicating—or their discussions regarding the fact that a natural barrier such as a freeway does impede the movement of people and that they had concurred in other people's review of the situation. They drew this as a part of their conclusions.

Q. With whom did you have these discussions?

A. With Tibor Fabian.

Q. Who were the other people whose conclusions he relied upon to arrive at this determination?

A. As I stated earlier, I do not know the people, plus the fact just from your own judgement and looking at an area and seeing a natural barrier going to the center of the area, it is natural that it is going to impede the progress of people. Grocery stores are a matter of convenience and if you have to go around a barrier, go around something, it does from a barrier to easy access to the store.

Q. How many undercrosses or overcrosses were available to people residing on the other side of the Long Beach Freeway within the one-and-a-half-mile theoretical draw area?

A. This again was beyond the scope of our particular engagement.

Q. Was any traffic study undertaken to determine how much traffic passed over or under the Long Beach Freeway?

[fol. 37] A. I do not—A study was not made because it

was beyond the scope of the work outlined by our client.

Q. Did your client give you a memorandum outlining the procedures you were to follow?

A. The client indicated a particular problem and what they wanted done. We then developed our own approach to this thing to develop the conclusions as we saw them.

Q. Did you make a determination as to whether it is necessary to interview consumers to determine whether a freeway will act as a barrier?

A. Again this was beyond the scope of what our client requested. There are many ways to make an analysis of a particular problem and our particular assignment was to arrive at a conclusion based on this theoretical draw area which we developed and imposed upon a map, and based on our judgment and review of periodicals. As I recall, Facts Consolidated made personal checks on people who shop at the stores and that was their particular engagement. Ours was strictly from an objective statistical analytical approach of terrain, draw area and the like. We did not interview any consumers.

Q. Did you assume for the purpose of adjusting your draw areas that a freeway will form a barrier to a draw area?

A. Well, you have to take a look at the total situation. It is not a complete barrier, it impedes. Again, it depends on the access and other stores in the area as to how much of a barrier it performs. So you have to take each [fol. 38] individual situation and analyze it.

Q. What criteria do you use to analyze these individual situations?

A. You approach on the basis, which we did on the maps which were submitted as exhibits, we drew the draw area and then we imposed upon the draw area the various natural obstacles, taking a look at this, based on our judgment and knowledge of the area, we proceeded to arrive at these conclusions.

Q. What criteria did you use, other than the location of this freeway on the map, to determine that this freeway was a barrier?

A. Well, the existence of a natural barrier is going to impede or cause people to go to some other place. For instance, if you have a store next to a freeway and you

live right across the freeway and there is no access for a mile in either direction and there is a store three-quarters of a mile away, yet because this store is only 200 yards away from you it forms a natural barrier and you will not go there.

So based on our judgment and looking at the particular barriers, in this particular case the Long Beach Freeway, or in the case of others such as the Los Angeles River and the like, we looked at the terrain, these natural barriers and then looking at the competition in the area arrived at how effective this barrier might be.

Q. When you looked at the competition in the area you [fol. 39] assumed that all the chain stores in the area were the same size, did you not?

A. Again I do not know the sizes of the various stores in the particular area. I don't know whether this is a conclusion you can draw that they were the same size, because I don't know. I do not know the facts.

Q. Do you know how Dr. Fabian measured the qualitative importance of these various chain stores in the area as major competitors?

Mr. Vaughn: I object to the question. You just passed me over with that word "qualitative."

Mr. Coyle: Q. Do you know whether Dr. Fabian made any evaluation of the competitive importance of the chain stores in the area?

A. Well, as indicated earlier, you have to take a look at each one of these, and based on your judgment, of the location of the store that is under review, whether it be Von's or Shopping Bag. Then looking at the barriers that are in the vicinity and then looking at the other stores, we looked at the larger ones, in other words the larger-chain stores, the medium-chain stores and the like. We did not get down into the small stores.

So we just looked at the bigger ones, and seeing that they were much more accessible, and then going back to the basic assumption that the normal draw area is one and a half to two miles, unless there is some barrier that impedes [fol. 40] them, you come to what we feel is a valid conclusion that they would go to the store that is most accessible to them under most circumstances.

Q. When you undertook to adjust this draw area did you make any assumption as to the percentage of the Von's customers who would give convenience as their reason for preferring one store over another?

A. Here is a fact I am not aware of. You say "give convenience as the fact." I am not aware of these particular customer preferences. We had to go to this on the assumption of the normal draw area.

And here again you have to develop your assumptions and sort of ride with them. In this case the one and a half to two miles. We recognize that based on personal preferences people will come from outside the area and also we recognize that people within their draw area will go some place else. We assume that this will balance out over the long run.

Q. Is it correct in saying that you assume that just as many people will come into a draw area as will go out of a draw area in order to do their grocery shopping?

A. I wouldn't say that is a specific generalization. I would say, again based on studies, we find that people come from beyond the two-mile draw area for many reasons. Again the personal preference, the fact that it is a straight line to a particular store, there is no other store [fol. 41] within their—they are three miles from the store and they are the closest store to them and it could be six miles that is the closest store to them.

Q. Does driving time enter into the location of the draw area?

A. As I stated, the draw area established here, based on the studies, has been set, based on our assumption, which is as valid as anybody else's, we had to come to a conclusion based on the facts we had gathered from several sources, that the majority of the customers come from these particular radii.

Mr. Coyle: Would you read the question back again, please.

(The reporter read the pending question.)

Mr. Vaughn: I think he answered the question. He said he would not make that as a specific generalization and went on to explain.

Mr.Coyle: Q. Would you assume that some people go out of the two-mile radius to purchase their groceries and some people from without the two-mile radius will come into the two-mile draw area to purchase their groceries?

A. I think this has been substantiated by Facts Consolidated, which points out that people do have preferences and will move from a matter of a few blocks from a store and go some place else which is a mile or so away.

Q. Therefore, would it be correct to say that [fol. 42] competition may well exist between two stores whose two-mile draw areas do not intersect?

A. I will get your phrasing right there. Is it safe to assume what?

Q. That two stores whose two-mile theoretical draw areas do not intersect may well compete with each other?

A. I think that I have to go back again to the statement, people do go from beyond two miles to go to a particular store based on personal preference as well as freeways and the like.

Q. On Page 5 of your affidavit you use the term "competition between the stores." What do you mean by the word "competition" on Line 10, Page 5?

A. Well, by competition they are competing for the same customers or the people in the same draw area. We are saying in this particular instance that this refers to the overlap of the draw areas.

Q. Is that based upon the assumption that people won't come in from outside the draw areas or won't go outside the draw areas?

A. This is contrary to everything that I have ever said to this point. We said that people do come from beyond a one-and-a-half-mile or two-mile radius. We said that people basically, the majority of the people, will come from within this radius, but people, because of natural preference, will come from distances beyond two miles.

[fol. 43] Q. And do stores that are more than four miles apart compete for these people who for personal preferences or other reasons aren't bound by the two-mile draw area?

A. Well, you are stating a fact that you said "four miles apart" in a two-mile draw. The two-mile draw meets right in the center of the two stores four miles apart.

Q. But some people will go more than two miles, will they not?

Mr. Vaughn: He has answered that question at least ten times. I am going to object to it on the ground that it has been asked and answered.

Mr. Coyle: Will you read back the question before the last one, please.

(The reporter read the pending question as follows:

"Q. And do stores that are more than four miles apart compete for these people who for personal preferences or other reasons aren't bound by the two-mile draw area?")

Mr. Vaughn: There has got to be a limit to the number of times you can ask one question, Mr. Coyle. I don't know how that limit is going to be imposed.

Mr. Coyle: When I get an answer I understand I will stop asking it.

The Witness: Would you please repeat that?

(The reporter reread the question.)

[fol. 44] The Witness: That question is unclear to me. Could you rephrase it?

Mr. Coyle: Q. I think that you testified that there are some customers who will go outside the two-mile theoretical draw area of a store to purchase their groceries. On the other hand, there are other customers from outside the two-mile radius who will come into the theoretical draw area to purchase their groceries.

A. Excuse me. Aren't both those things the same thing?

Q. The same phenomena with respect to these that are inside the draw area and outside the draw area. My question is: When you set up these overlap areas, superimposing one two-mile theoretical draw area upon another theoretical two-mile draw area, aren't there other customers who are not in that overlap area who would be potential customers of either of the two stores and wouldn't the two stores compete for the patronage of those customers? Do you understand that question?

Mr. Vaughn: I object to the question as being ambiguous, uncertain and unintelligible. If I understand it it has been asked and answered.

Mr. Coyle: Q. Do you understand the question, Mr. Bouque?

A. I am confused by the question.

Q. Do you suppose if it were read to you you might [fol. 45] understand it?

Mr. Vaughn: You don't have to answer that. It is immaterial.

Mr. Coyle: Read it to him, please.

(The reporter read the pending question.)

(Discussion off the record.)

Mr. Coyle: Q. We will pass this question until we get to the overlap areas themselves.

Returning to Page 21, you state, "The Long Beach Freeway forms a barrier at the border of the 1.5-mile zone on the west." Is it your testimony that this Long Beach Freeway doesn't form an absolute barrier?

Mr. Vaughn: Does not?

Mr. Coyle: Q. Does not.

A. Does not.

Q. And that some customers will pass under or over the freeway to get to the Von's store?

A. That is correct.

Q. And you don't know how many customers will pass under or over the freeway to get to the Von's store.

A. We don't know the exact number as to how many will do this, no.

Q. What kind of a number do you know as to how many will do this?

A. Here again this is a judgment factor. You can't isolate the question in this manner by saying the Long [fol. 46] Beach Freeway restricts so many people. It is the total situation in this environment, the Long Beach Freeway and other stores in the area which determine, in our judgment, the numbers of people that were restricted or impeded, shall we say, in moving around this.

Q. How many stores were there on the other side of the Long Beach Freeway?

A. I would have to refer to the maps to tell you exactly. First of all, how many stores are beyond the Long Beach Freeway I don't know. This takes the entire universe.

Q. Do each of those stores enter into your judgment?

A. Again going back to our basic assumption that normally a housewife, or whoever is shopping in the store, the majority of the customers are going to shop this store based on convenience within these draw areas.

Q. By "majority," how large a majority do you mean?

A. Well, as stated earlier, we referred to surveys, one of them being the Facts Consolidated, which we indicated the majority could change from 63 to in excess of 90 per cent of the customers that fall within the two-mile radius of the store.

Q. Is it your understanding, and was it your assumption, that Facts Consolidated's figures and the workings of Dorothy Corey led to the conclusion that the 60 to 90 per cent of the customers residing in the two-mile radius shopped on the basis of convenience?

[fol. 47] Mr. Vaughn: I object to the question as being uncertain, ambiguous and unintelligible. He said 63 per cent and not 60.

Mr. Coyle: Reread the question and see if he understands it.

(The reporter read the pending question.)

Mr. Vaughn: I also object to that as having been asked and answered. He has told you repeatedly the number of things that he relied upon to determine the draw area of a particular store. You asked him to repeat it once, you have asked him to repeat it twice, and this is the fourth or fifth time you are asking him to repeat what he based that on.

Mr. Coyle: All right. Let him now answer the question, please.

The Witness: The determination of the draw area was based on a series of facts obtained from various sources, be they reports or discussions with people in industry as indicated before, upon which we in our judgment stated an assumption of this 1.5- to two-mile radius, and it was on this basis that we conducted our survey.

Mr. Coyle: Q. Which people in the industry were these conferences or discussions held with?

A. As I indicated——

Mr. Vaughn: I will object to the question as having been asked and answered. You know very well, Mr. Coyle, that you cannot get away with this in the courtroom. You [fol. 48] cannot ask the witness the same question up to a dozen times. I do not think that it is proper for you to try and do so here and I very strenuously object to your doing it.

Mr. Coyle: Q. Now go ahead and answer it.

A. As I stated before I am not aware of the individuals that he discussed this with.

Q. When you made your affidavit did you assume that more than 48 per cent of the persons who shopped at Von's shopped there because of convenience?

A. Where does this 48 per cent come in?

Q. I am asking you. I am just asking you, did you assume that more than 48 per cent of the customers who shop at Von's shop there because of convenience?

A. I do not know the individual reasons as to why a person shops at a particular store. There are a myriad of reasons as to why they shop. One of the principal reasons is convenience. But there are many reasons. As to the exact percentage, this was beyond the scope of our work. I do not know the facts.

Q. You do not know whether 48 per cent or 58 per cent of the people who shop at Von's shop there because of convenience?

A. This was beyond the scope of our study and I am not aware of the facts involved here.

Q. You did not take that into consideration when you set up your procedures?

[fol. 49] A. We took a statistical approach based on, as I have said several times before, based on various sources and which no reasons were given as to the specific percentages of why people shop at a particular store. We based it on the results of these surveys that showed so many people, or percentage of so many people came to a store from within these given 1.5 or two-mile radii.

Q. Now referring to the figure on Line 12 of Page 21,

82,800 people, which is 7,300 people fewer than the population estimated for the theoretical draw area. Upon what did you base that reduction in the population in the adjusted areas?

Mr. Vaughn: Do you want to add that again?

Mr. Coyle: It is more than that.

Mr. Vaughn: 13,300.

Mr. Coyle: Thirteen three.

Q. What did you base that reduction of thirteen three on?

A. The reduction of thirteen three, the reasons for adjusting the draw area was based on looking at, again, the situation that existed in the draw area of this particular store looking at the physical barriers that would impede the access of people to the stores, the other competition in the area, and based on our judgment the resulting figure for the adjusted draw is 13,300 less than the theoretical draw.

Q. Is that the total population residing on the other [fol. 50] side of the Long Beach Freeway?

Mr. Vaughn: Within the two-mile draw area?

Mr. Coyle: Within the two-mile draw area.

The Witness: I would have to check the charts to determine this, but I would assume that it would not be the total number of people, because there will be people that will be coming to the Von's store. As I say, the barrier impedes, it does not prohibit the people from moving.

Mr. Coyle: Q. If it is the total population residing on the other side of the Long Beach Freeway would it be your testimony that the adjusted draw area understates the population that would be available to the Von's store?

Mr. Vaughn: That is a speculative question, to which I object.

Mr. Coyle: It is his judgment that I am asking for.

The Witness: I am going to have to have the question repeated. I don't follow your question.

Mr. Coyle: Would you repeat the question, please.

(The reporter read the pending question.)

The Witness: I am trying to figure out what you mean by this statement.

Mr. Vaughn: He is asking you, subject to my objection, if the total population on the other side of the Long Beach Freeway and within the two-mile draw area were eliminated as potential customers of the Von's store would that understate the number of people who were potential customers of the Von's store.

Isn't that right?

Mr. Coyle: That is correct.

The Witness: Now it is that the Long Beach Freeway is a permanent barrier, that they can't come through?

Mr. Vaughn: That is not what he asked.

Mr. Coyle: Q. You have already testified, I believe, that it was not a complete barrier.

A. Right.

Q. I am asking then would you be understanding the estimated population of the adjusted draw area if you eliminated all the persons residing on the other side of the Long Beach Freeway within the two-mile limit from your theoretical draw area?

Mr. Vaughn: To which I have the same objection.

Is there some aspect of it that you don't understand?

The Witness: I just don't understand the question, what he means by this understating of population available to Von's store. There is 13,300 people in the area and that is the total population over there beyond the freeway.

Mr. Vaughn: Does that answer your question?

Mr. Coyle: No. I am asking him whether or not in doing this he eliminated the entire population residing on the other side of the Long Beach Freeway within the two-mile zone.

Mr. Vaughn: In arriving at his adjusted draw area.

[fol. 52] Mr. Coyle: Yes.

Mr. Vaughn: Did you or didn't you?

The Witness: First of all that is not the entire population on the other side of the freeway.

Mr. Coyle: Q. It is not the entire population on the other side of the freeway within the two-mile area?

A. I would again have to check the maps to be accurate. But, as I pointed out earlier, this population, this estimate of the 13,000 difference by adjusting it is our best estimate of the people in that area beyond the freeway who would

probably shop at another market, that they would be impeded from coming to the Von's Store No. 4 in this case.

Q. It is not the entire population.

A. It is not the entire population.

Q. What percentage of the population is it?

A. I do not have those facts. I can get them but I don't have the facts in my head at this point. I would have to review the maps and the census figures.

Q. If we can find the maps perhaps you can review it.

(Discussion off the record.)

Mr. Vaughn: Mr. Coyle, are these maps that you had prepared from maps that we had Lybrand prepare?

Mr. Coyle: To the best of my knowledge, yes, these are the maps that we had prepared from maps that Lybrand prepared.

Mr. Vaughn: The census figures which appear on this [fol. 53] copy of the map, which you had prepared, are missing for the three crucial areas in question. It looks like they were there but they are not any longer.

Mr. Coyle: Q. Mr. Bouque, I show you a map entitled "San Gabriel Valley Area," which I understand is to be an exhibit attached to your affidavit—

Mr. Vaughn: It is a copy of an exhibit to be introduced.

Mr. Coyle: Q.—it is a copy of an exhibit to be introduced as part of your affidavit. I refer you to the store known as Von's No. 4 and ask you if you can locate it on this map.

A. It is right here (indicating).

Q. You have located it. Now I ask you if there is a one-and-a-half and two-mile radius drawn around Von's Store No. 4.

A. There are.

Q. Now I ask you whether the Long Beach Freeway is plotted along the one-and-a-half-mile zone on the west.

A. Yes.

Q. Now I ask you whether or not you have used that Long Beach Freeway as the boundary in adjusting your draw area.

Mr. Vaughn: Which draw area?

Mr. Coyle: Q. In adjusting your 1.5-mile draw area for this store.

[fol. 54] A. Not in adjusting the 1.5-mile radius because—

Q. In adjusting the two-mile radius?

A. Yes, in adjusting the two-mile radius.

Q. Now I ask you the total population residing within the adjusted draw area as shown on the map.

A. The figures that should be on the map are missing.

Mr. Vaughn: He is asking within the adjusted draw area.

Mr. Coyle: That is correct, within the adjusted draw area.

The Witness: Would you repeat your question again?

Mr. Coyle: Q. I am asking if you can compute the total population residing within the adjusted draw area as shown on this map.

A. For the two mile.

Q. For the two-mile area minus the area west of the Long Beach Freeway.

A. Yes, I would be able to compute it by taking the particular areas.

Q. Could you do that now from this map that is in front of you?

Mr. Vaughn: He has already done it in his affidavit. Do you want him to do it again?

Mr. Coyle: What I am trying to ascertain is whether he excluded everybody residing west of the Long Beach Freeway.

The Witness: It would take some time to compute these [fol. 55] because there are going to be some prorations on this, but it can be computed.

Mr. Coyle: Q. But you cannot compute it from the map.

A. It would take some time to do it.

Q. Can you do it if we give you a ten-minute recess?

Mr. Vaughn: If I don't miss my guess, that is going to take a half an hour to do, but he can do it. He has to take each one of these census tracts and determine what percentage of them are in the overlay area—I don't know if he has the tools to do that—and then prorate the popu-

lation of that census tract. There must be 10 to 12, maybe a dozen census tracts as to which he has to do that. Do you want him to do that?

Mr. Coyle: I would like to get the answer to the question as to whether or not he excluded everybody residing west of the Long Beach Freeway.

Mr. Vaughn: That is your ultimate aim.

Mr. Coyle: That is correct.

Mr. Vaughn: Can you answer that question without doing this?

The Witness: To the best of my knowledge—

Mr. Coyle: Q. That doesn't answer it. Do you know whether or not?

A. Mr. Coyle, as we have indicated on several previous occasions these figures were developed by our staff prior to my participation in this work. Therefore, I am not [fol. 56] familiar with the intimate details of exactly how they did it. It would be my assumption, if you are willing to accept this, that the total population in that area beyond the Long Beach Freeway in the two-mile radius, the total population was not excluded from our figures.

Q. That is your assumption but you do not know.

A. That is correct.

Q. Now referring to this map marked San Gabriel Valley area, and referring to the Von's Store No. 4 and the Shopping Bag store located in Montebello—

Mr. Vaughn: In Montebello at Greenwood and Whittier?

Mr. Coyle: I presume that is the address.

Q. Does the map indicate that there is an overlap in the one-and-a-half and two-mile draw areas of the Von's Store No. 4 and the Shopping Bag store in Montebello?

Mr. Vaughn: You are now talking about theoretical as opposed to adjusted draw area?

Mr. Coyle: Yes.

The Witness: There is an overlap in the theoretical draw areas at both the one-and-a-half and two-mile radii.

Mr. Coyle: Q. Now referring to the first overlay, which plots competitive stores, does that overlay indicate that there are two Safeways, a Market Basket and an A & P

in the area of either the Montebello store or the Von's No. 4?

A. That is correct.

Q. We are now placing the overlay showing freeways [fol. 57] and railroads. Does this overlay show all freeways and all railroads that are in either the Montebello or the Von's No. 4 draw areas?

A. On a quick review, yes. It includes the Union Pacific, Santa Fe, Long Beach Freeway and the Rio Hondo Wash.

Q. On the basis of anything shown on this map have you adjusted the draw area for either the Montebello store or Von's No. 4?

A. On the basis of this map—

Mr. Vaughn: That is Von's No. 4 and Shopping Bag No. 40, if I may aid the witness in order to speed this along.

The Witness: Yes, there were adjustments in both the draw areas in both of the situations here.

Mr. Coyle: Q. Were the adjustments on Von's No. 4 the adjustments that we have been discussing?

Mr. Vaughn: You mean the Long Beach Freeway only.

Mr. Coyle: Yes.

The Witness: That is correct.

Mr. Coyle: Q. And on what page of your amended affidavit do you discuss the Shopping Bag store on?

A. We discuss the Shopping Bag Store No. 40 on Pages 27, 28 and 29, in which case we indicate there is an adjustment to the draw area of Shopping Bag No. 40.

Q. What are those adjustments?

A. The reasons for the adjustments is the Rio Hondo River is a barrier for all residents in the two-mile draw [fol. 58] east of the river. A small pocket of residents east of the river within the 1.5-mile area do have reasonable access to the store and are considered part of the draw. The railroad does not appear to constitute a significant barrier.

Q. Will you show me where the river is?

A. It is right along here (indicating).

Q. How do the residents between the river and the one-and-a-half-mile radius get to the Shopping Bag store?

A. They would come down, if they shop at Shopping Bag, they would probably come down Whittier Boulevard.

Q. Is there a bridge across the river?

A. It indicates on the map that there is.

Q. Is there one bridge or two?

A. One bridge across Whittier Boulevard.

Q. Are there any other bridges across there?

A. Way up on Beverly Boulevard there is a bridge, and way down on Washington there is a bridge.

Q. There are three bridges across the river there, are there not?

A. That is correct.

Q. Did you take anything other than the existence of the river into consideration when you determined that the people residing east of the river and within the one-and-a-half-mile radius would have access to the Shopping Bag but the people residing east of the river between the one-and-a-half and two-mile radii would not have access to Shopping Bag?

[fol. 59] A. Well, as indicated in the affidavit, it was pointed out the small pocket of residents east of the river within the 1.5-mile area do have reasonable access and they would in the main use Whittier Boulevard for access to the Von's store.

Q. Did you make any study to determine if they would in the main use the Whittier Boulevard bridge?

A. Well, I again did not make the actual determination. I reviewed the facts. But based on the map in front of me, the principal access, if people were going to the Von's store, such as myself, Whittier Boulevard is the method by which I would approach the Von's store since, one, the Washington Street bridge is way down south several miles from Whittier, and which is an uninhabited area between Whittier and Washington, and that there appears to be no access immediately from this little pocket to Beverly Boulevard without going some distance in the other direction.

Q. The people residing between the one-and-a-half and the two-mile radius east of the river, is the Whittier Boulevard bridge accessible to them?

A. Yes.

Q. Are any other bridges accessible to them?

A. The Beverly Boulevard bridge would be accessible to them.

Q. And was there another bridge up north that is accessible to them?

[fol. 60] Mr. Vaughn: That is Beverly Boulevard.

The Witness: This is Beverly Boulevard.

Mr. Coyle: Q. Is there a bridge south that would be accessible to them?

A. There is a bridge accessible to them on Washington Street.

Q. Are there any stores shown on your map between that pocket on the east of the river between the one-and-a-half and two-mile draw area that those people could shop at other than the Shopping Bag store?

A. Yes. There is the one here labeled "CR." I don't recall the code offhand.

Q. Is there anything on the map to indicate that that store "CR" is more accessible to those people than the Shopping Bag store?

A. Based on the black dot in the center it indicates that it is between—that that store is between Von's and their home if you came down Whittier Boulevard.

Q. How much closer to them is it than the Von's store?

Mr. Vaughn: This is a Shopping Bag store, is it not?

Mr. Coyle: This is a Shopping Bag store.

Q. Aren't they just about on the same block?

A. They are about two or three blocks away.

Q. At most?

A. At most.

Q. Do you think that that store would be more of a [fol. 61] deterrent to those people residing between the one-and-a-half and the two-mile radius than to the people residing within the one-and-a-half-mile radius, the people on the east side of the river, to the Shopping Bag?

Mr. Vaughn: And the river is a deterrent to their shopping at Shopping Bag.

Mr. Coyle: Q. When you determined that the people residing east of the river, between the one-and-a-half and two-mile radius, would not shop at the Shopping Bag

store but the people residing east of the river within the one-and-a-half-mile radius would shop at the Shopping Bag, did that store marked "CR" play any part in that determination?

A. Again this was a judgment factor which I did not participate in at that time. I am not able to verify this fact at this time.

Q. Reviewing the material did you find that it had played any part in their determination?

A. There was nothing that I saw that was documented on this thing. Again, people in exercising judgment don't necessarily always document each individual item considered at this particular point.

Q. Now referring to the barrier on the west—

Mr. Vaughn: I thought he was not finished with the answer and there was an interruption on the answer to the question on what other stores were available to the people in that area.

[fol. 62] Mr. Coyle: I am sorry.

The Witness: Well, again the determination where people are going to go is a total situation.

Mr. Vaughn: Had you completed your answer with respect to what other stores are available to the people east of the river?

Mr. Coyle: Why don't we read my last question back to him.

Mr. Vaughn: That wasn't the last question. It was a prior question where you stopped the answer in order to inquire about this particular store, I thought.

Mr. Coyle: I am sure that he had completed that one.

Q. Now returning to the barrier on the west, which I think is the Long Beach Freeway, did you take any competitive stores into consideration when you evaluated that freeway as a barrier?

Mr. Vaughn: This one over here?

Mr. Coyle: Yes.

The Witness: Again I was not in on the actual determining judgment factor as to what entered into each of these individual decisions. All these factors played a part in arriving at the adjusted figure, the barrier, the acces-

sibility of other stores that are involved in this particular decision, I am sure.

Mr. Coyle: Q. Does the map show any competitive stores more accessible to those people residing between [fol. 63] the two-mile barrier and the two-mile radius and the Long Beach Freeway than Von's Store No. 4?

A. This particular map does not indicate. It is at the edge of the map and there are no other stores indicated on this map.

Q. In your review of the work do you know whether or not they took any stores into consideration?

A. No, I do not.

Q. Were the records available which would show you whether or not they took any stores into consideration?

A. As I indicated previously there are two or three file cabinets full of data. I have perused through portions of this rapidly and I am not able to identify all the minute details of what is in each one of these folders.

Q. In your entire review of their work have you ever reversed or changed any determination they previously made?

A. Again this report, these maps, were prepared by the staff and submitted prior to my participation in the survey.

Q. And you haven't changed any of them?

A. I have not analyzed these to make a change. It was submitted as an affidavit. Again, the people are experienced in this area and prepared this based on their own best judgment. They reached their assumptions and carried through on their judgment as to what the facts were, submitted their reports and the figures and data, [fol. 64] maps and so forth that were submitted in evidence to the Court.

Q. And they were submitted to defense counsel.

A. To defense counsel.

(A short recess was taken.)

Mr. Coyle: Q. Mr. Bouque, I show you a map entitled "Southeastern Area," which I believe to be a copy of an exhibit you intend to attach to your affidavit. I ask you if you can locate Von's Store No. 26 on this map. Is that

store located in Garden Grove at 12151 Brookhurst Avenue?

A. That is correct.

Q. I ask you whether the map shows the one-and-a-half and two-mile theoretical draw areas for that store.

A. They do.

Q. On Page 66 of your affidavit do you list the estimated population within the one-and-a-half and two-mile radius?

A. We did.

Q. In listing this estimated population do you take into consideration any competing stores in the area?

A. The estimated population is based upon the population encompassed by the 1.5-mile radius and the two-mile radius, irrespective of the stores in the area.

Q. You say there are five larger-chain stores, one Shopping Bag, two medium-chain stores, one smaller-firm store. When you say "smaller-firm store," you don't necessarily mean that it is a smaller store, do you?

[fol. 65] A. It is a smaller firm. In other words, an independent or possibly a two- or three-store chain.

Q. We have placed the first overlay on the map. I wonder if you could name for me the major chain stores within the one-and-a-half-mile radius.

A. From what store?

Q. From the Von's store.

A. Well, there is a Safeway and "THR"—Thriftmart—Mayfair, Safeway and Food Giant. There are five stores within the 1.5-mile radius of the Von's location.

Q. Would you name for me the stores that are within the two-mile radius of the Von's store?

Mr. Vaughn: The major chain stores?

Mr. Coyle: Major chain stores.

The Witness: Again Safeway, Mayfair and Thriftmart are the stores, in addition to the five mentioned.

Mr. Coyle: Q. Now we have placed the third overlay on the map and I ask you whether it indicates any major barriers?

A. The principal barrier in the area of the Von's Store No. 26 is the Pacific Electric line which bisects the area of the Von's store—approximately bisects the draw areas, the 1.5 and the two-mile draw areas of the Von's store.

In addition there is the Southern Pacific line which runs—Pacific Electric Railway, which is a subsidiary of the Southern Pacific, is near the 1.5-mile radii on the north side.

Q. Did you determine that the Southern Pacific that [fols. 66-67] bounds the 1.5-mile draw area on the north constituted a barrier?

A. Yes. The railway, the Pacific Electric, constitutes a partial barrier in this area.

Q. I was referring to the Southern Pacific line. Did you find that it constitutes a barrier?

A. The Southern Pacific line is the owner of Pacific Electric Railway. They are one and the same.

Q. The Southern Pacific line is the one up here at the north edge along the 1.5-mile draw line.

A. Correct.

Q. Does it constitute a partial barrier or a complete barrier?

A. It would constitute a partial barrier.

Q. It would constitute a partial barrier. And you would not subtract from the population in the adjusted area, of the theoretical draw area of the total population residing between the Southern Pacific line on the north and the two-mile radius?

A. It was assumed, as stated on Page 67 of the report, that the core of the business did not extend beyond the 1.5-mile radius.

Q. Where was that assumed on the report?

A. On Page 67.

Q. Is that referring to the Pacific Electric line or to the Southern Pacific line?

[fol. 68] Mr. Vaughn: Actually that is probably a misprint of those. Both of those are Pacific Electric, according to the map. Southern Pacific owns the Pacific Electric and that is apparently where the discrepancy has arisen. They are one and the same.

Mr. Coyle: Q. Is it your testimony that the Southern Pacific line on the north and the Pacific Electric line which bisects the area are barriers of the same magnitude?

A. Would you repeat that last question?

(The reporter read the pending question.)

The Witness: No, they are not barriers of the same magnitude.

Mr. Coyle: Q. What magnitude is the Southern Pacific line on the north? Is that a complete barrier?

A. It was assumed that the core of the business did not extend beyond this 1.5-mile radius. There were naturally people who, as we have stated before, would on personal preference come there. But with the Shopping Bag store there and the Food Giant and Mayfair and the rest of them in the immediate vicinity, I would say for all practical purposes they would be shopping at the other stores. They are closer.

Q. I am trying to understand the statement that the Southern Pacific line that bounds the 1.5-mile draw area on the north constitutes a barrier. Is that this line that comes right across and turns north?

A. That is correct.

[fol. 69] Q. That constitutes a barrier. Then the Pacific Electric line which essentially bisects the entire drawing area constitutes a partial barrier. Is that this diagonal line that looks on this map as though it almost goes through Von's store?

A. That is correct.

Q. When you went about adjusting the population from your theoretical area to your adjusted draw area for the Von's store what did you do with the population residing between the Southern Pacific line, that is the northern line that turns and runs north? What did you do with the population residing between that barrier and the two-mile radius?

A. I would want, as a matter of fact—I could not tell you absolutely what determination was made in this specific instance, but based on the fact that there are several larger chains nearer the home owner's residence than they are to the Von's store and the fact that there is this barrier there, probably for all practical purposes and based on the statement on Page 67 this population was probably excluded from the adjustment to the adjusted draw area.

Q. Do you know whether it was excluded or not?

A. I would have—On a statement of fact I do not know exactly what was done in this particular instance.

Q. Do you know whether in this whole affidavit which you have written, and this appendix to it, when a line is designated as a barrier whether or not you always [fol. 70] assumed that it is a complete barrier and that nobody residing outside that barrier is computed within the estimated draw area unless there is a notation such as there is here that it is a partial barrier?

A. Well, again, as we have stated, we had to make some assumptions as to the draw areas 1.5 and two miles, and then we inserted the natural barriers and other barriers that are in the area based on the stores or supermarkets in the area. All these are determinants as to how many or what adjustment you would make, rather, in your estimate.

As I was not in on each individual adjustment, because of the judgment factor that enters in there, I cannot as a statement of fact tell you exactly what was done in each individual instance.

Q. Can you tell us what was done in any instance?

A. I can tell you the approach that was made. As I said before I did not get into this particular phase of the study. It was completed prior to my coming into this situation.

Q. Referring to Von's No. 4, which we discussed previously on Page 20, in which it says that the Long Beach Freeway forms a barrier at the border of the 1.5-mile zone on the west, do you know whether or not the population residing in the area between the Long Beach Freeway and the two-mile radius was treated any differently for adjustment purposes than the population residing between [fol. 71] the Southern Pacific line and the two-mile radius in Garden Grove?

A. I imagine—As a statement of fact I do not know. Seeing the two maps I would say there would be a difference in judgment exercised in these two areas.

Q. Now referring to Shopping Bag No. 33, which I believe is located in Anaheim at 9922 Katella Avenue, can you locate that?

A. I have.

Q. Does this map show the one-and-a-half and two-mile draw area radii for the Shopping Bag store?

A. It does.

Q. Do the two-mile and one-and-a-half-mile radii for the Shopping Bag Store No. 33 intersect with the radii for Von's Store No. 26?

A. They do. Von's 26 and Shopping Bag 33, both the 1.5 and the two-mile radii intersect.

Q. As a matter of fact, isn't the Von's within the one-and-a-half-mile Shopping Bag radius and the Shopping Bag store within the one-and-a-half radius of the Von's store?

A. The Von's store and the Shopping Bag store are in the overlap area of the one-and-a-half-mile radii.

Q. Has it been your testimony that the Shopping Bag store would draw some customers from outside its two-mile radius?

The Witness: Would you read that question back?

[fol. 72] (The reporter read the pending question.)

The Witness: I have indicated in our previous discussions that a Shopping Bag store could draw customers from beyond the two-mile radius.

Mr. Coyle: Q. Do you know from the surveys and reports that you read that they do draw some customers from outside the two-mile radius?

A. This was not part of our survey. However, I have seen the Facts Consolidated report which showed that there were customers going to certain Von's stores, not necessarily this particular one, from beyond the two-mile range.

Q. Have you ever seen any studies showing that either a Von's store or a Shopping Bag store draws no customers from outside the two-mile radius?

A. No.

Q. So would it be your understanding that they all draw at least some of their customers from outside the two-mile radius?

A. I would believe that is a valid assumption.

Q. Would some of the customers of the Shopping Bag store residing outside the two-mile radius also be customers of this Von's store shown on this map?

Mr. Vaughn: Would Shopping Bag customers be Von's customers; is that what you are asking?

Mr. Coyle: Let me rephrase the question.

Q. Would some of the Shopping Bag customers residing [fol. 73] outside the Shopping Bag two-mile radius live within the Von's two-mile radius?

A. It is entirely possible on a preferential basis that certain persons would prefer to shop at either Von's or Shopping Bag in preference to the other. And surveys, again Facts Consolidated, in one particular one—I do not recall the store names—it showed several people lived almost adjoining the Von's store and doing their shopping at Shopping Bag and vice versa.

Q. As a result of this fact that some customers come from outside the two-mile radius would it be proper to say that the overlap area shown on this map does not portray all the competition between Von's and Shopping Bag?

A. If I understand your question correctly, surveys have indicated that both stores draw from beyond their two-mile radius. So they would be getting customers from beyond that distance.

Q. And they would compete in areas other than the overlap area?

A. This is entirely possible on a preferential basis that people will come from beyond this two-mile radius.

Q. And you don't mean to say in these exhibits that the competition between the two stores is limited to the overlap area.

A. We won't say that competition is limited to the overlap area, no, exclusively to that area.

[fol. 74] Q. Now we put the overlay back down on the map of the southeastern area. Does this overlay indicate that there were six larger-chain stores plus Von's within the one-and-a-half-mile radius of your theoretical one-and-a-half-mile draw area around the Shopping Bag store?

A. It does.

Q. Does it show that within the two-mile radius there were seven larger-chain stores, one Von's store, one store of a medium-sized chain and one store of a smaller firm?

A. That is correct.

Q. Now we put down the overlay showing barriers. I ask you if there were any barriers on the one-and-a-half or two-mile draw areas of the Shopping Bag Store No. 33.

A. There are two—There is one line of the Pacific Elec-

tric Railway which forms a barrier for potential customers in the two-mile draw area to the southwest. The Santa Ana Freeway at the edge of the two-mile draw area forms a barrier.

Q. That is located at the northeast edge?

A. That is beyond. It is on the edge there.

Q. Is the Southern Pacific line within the draw area of the Shopping Bag store?

Mr. Vaughn: Which, Pacific Electric?

Mr. Coyle: Southern Pacific line.

Mr. Vaughn: We are calling the one that runs——

Mr. Coyle: The one on the north.

Mr. Vaughn: ——west to east and then turns north the [fol. 75] Southern Pacific line.

Mr. Coyle: I believe that is the one he calls the Southern Pacific line in the document.

The Witness: That is correct.

Mr. Coyle: Q. Is the Southern Pacific line running through the Shopping Bag draw area?

A. Yes.

Q. Does it run through both the one-and-a-half and the two-mile areas?

A. Yes.

Q. Did you treat that as a barrier?

A. This is a partial barrier, yes.

Q. Did you treat that as a partial barrier for the Shopping Bag store?

A. That is the question I just answered, yes.

Q. Referring to your affidavit, can you show me where on the affidavit that you state that you treat the Southern Pacific line as a partial barrier?

A. I stand corrected. The adjusted draw area is spelled out in the report that the Pacific Electric Railroad forms a barrier for potential customers in the two-mile draw area in the southwest, the Santa Ana Freeway in the two-mile area to the north.

Q. Does this exhibit and does your appendix to your affidavit indicate that you treated the Southern Pacific line as a complete barrier with respect to Von's No. 26 [fol. 76] but did not consider it a barrier with respect to Shopping Bag No. 33?

Mr. Vaughn: The document speaks for itself and I object to the question on that ground. As a matter of fact, you are improperly summarizing what the document says.

Mr. Coyle: I am asking the witness.

Q. What does the document show, the document being both the exhibit and your report, as to the treatment of the Southern Pacific line as a barrier with respect to Shopping Bag No. 33 and Von's No. 26?

Mr. Vaughn: I will object to the question insofar as it relates to the document, which I assume you mean is the affidavit and its appendices, because the best evidence is the document. As a matter of fact, you have not characterized the document correctly. The adjusted overlap area is there.

Mr. Coyle: I am asking the witness how he treated the—

Mr. Vaughn: He may answer the question. I am merely stating my objection.

Mr. Coyle: I just hope he understands the question.

The Witness: As stated in the reasons for the adjusted draw area on Page 67, the Southern Pacific line bounds the 1.5-mile draw area on the north and constitutes a barrier.

Mr. Coyle: Q. That is with respect to Von's Store No.—

A. Von's Store No. 26.

Q. How did you treat that Southern Pacific line with respect to Shopping Bag No. 33?

Mr. Vaughn: What the document says or what he says? [fol. 77] Mr. Coyle: I am asking him how he treated it.

The Witness: Again the document states for Shopping Bag No. 33 the reasons for the adjusted draw area, the one line of the Southern Pacific Railway forms a barrier for potential customers in the two-mile draw area to the southwest. The other railroad line has not been cited in the document. This document was prepared prior to my association with the survey.

Mr. Coyle: Q. Do you know the reasoning and the judgments that were made to treat the Southern Pacific line

as a barrier with respect to the Von's store but not as a barrier with respect to the Shopping Bag store?

A. As I stated earlier I can express an opinion only as to what judgment was exercised by the staff who worked on this engagement. And I have cited previously the factors that were considered generally in this total survey as to the effectiveness of a particular barrier.

Q. Can you tell us how the Pacific Electric line was treated in making the adjustment of the theoretical draw area with respect to Von's No. 26 and Shopping Bag No. 33?

A. You are asking two questions.

Q. I am asking you how this Pacific Electric line was treated with respect to Von's 26 and Shopping Bag 33.

A. Excuse me, I misunderstood the question the first time. The Pacific Electric, which essentially bisects the entire drawing area on Von's 26, constituted a partial [fol. 78] barrier. In the case of the Shopping Bag No. 33 it also formed a barrier. In this case at the two-mile draw area to the southwest of the Shopping Bag store.

Q. In adjusting the theoretical draw area of Shopping Bag No. 33 you reduced the estimated population within the two-mile radius by 5,440 people. Where did those people reside?

A. These people would have resided to the southwest—correction. Again not having participated in the survey but using my judgment as to what happened at this particular point, it was that the people who were subtracted from the theoretical draw area probably lived to the southwest of the Pacific Electric line.

Q. Would they reside between the Pacific Electric line and the two-mile limit or between the Pacific Electric line and the one-and-a-half-mile limit, or between the one-and-a-half-mile limit and the two-mile limit to the southwest of the railroad?

A. This is a question of fact which I cannot answer at this time.

Q. Was this Pacific Electric Railroad considered a partial barrier with respect to the Von's store and a complete barrier with respect to the Shopping Bag store?

A. Did you say the Pacific line bisected?

Q. Yes. It is referred to as a partial barrier with

respect to the Von's store. My question is: What kind of [fol. 79] a barrier is it with respect to the Shopping Bag store? Is it a partial barrier or something other than a partial barrier?

A. It is a partial barrier.

Q. And it was treated exactly the same with respect to the Shopping Bag store as it was to the Von's store?

A. What do you mean by "treated exactly the same"?

Q. In determining whether or not how many people you were going to subtract in adjusting your draw area.

A. This was an adjustment made by the staff.

Q. Was it before you came on the case?

A. All of the exhibits, or this exhibit was prepared prior to the time I came on the case when they made the judgment factor and developed these particular figures.

Q. So that you really can't testify as to exactly what they did when they made these adjustments, can you?

A. I can't testify as to exactly what they had in their mind at the time they made the individual decisions. Again I have relied in my review of the documentation surrounding this report on the capability of the staff to gather the facts, analyze them and come to conclusions which they have felt were sound and I relied on their judgment as I came in subsequent to the time all these factors were discussed.

Q. When you refer to "the staff"—

A. I am including Dr. Tibor Fabian and Seymour Kwerel.

[fol. 80] Q. You are also relying on the standards that he set up that the staff was going to use in making these judgments.

A. That is correct.

Q. And you didn't participate with him in setting these standards when he set them?

A. I did not participate in setting the standards.

Q. Now referring to the overlap area with respect to these two stores, how did you treat the Pacific Electric Railroad line in computing your adjusted overlap area?

A. In this particular—

Q. Excuse me. I think perhaps that the Pacific Electric Railroad line, as used here, is the same line that was referred to as the Southern Pacific line on Page 67.

A. That's correct.

Q. With that correction how did you treat the Southern Pacific Railroad line, which is here referred to as the Pacific Electric line?

A. The adjusted overlap area at the 1.5-mile adjusted area is, for all practical purposes, the same as the 1.5-mile theoretical overlap. For the adjusted two-mile overlap the Pacific Electric line on the north is assumed to be a complete barrier.

Q. On what did you base that assumption?

A. The assumption, again, is what the staff assumed and I am not able to say what their assumption was at the particular time. Well, in large part based on the [fol. 81] general observations of the adjusted overlap area it is indicated there that because of the existence of several larger-chain stores to the north of the Pacific Electric, or Southern Pacific, whichever is appropriate here, it therefore acted as a barrier in adjusting the overlap area.

Q. Was this adjustment made prior to the time you came on the case?

A. That is correct.

Q. In evaluating the Alpha Beta Food Store to determine its relationship to this barrier did you take into consideration the parking facilities of Alpha Beta?

Mr. Vaughn: Which Alpha Beta? There are two.

Mr. Coyle: Either of these Alpha Betas.

The Witness: As stated previously, the individual weights or factors given in a specific instance I am not aware what was in the minds of the individuals making the evaluation. I was not a member of the team which established the charts and the estimates given on Page 70.

Mr. Coyle: Q. Did you ever inspect this area?

A. By "inspect," do you mean going out to the store itself?

Q. Yes.

A. I did not, no.

Q. You don't know how many crossings there were on these railroad crossings or how easy they were to cross?

A. I have not been out to the locale so I couldn't tell.

[fol. 82] Q. Was any study made to determine whether these were overhead railroads?

A. I know of no overhead railroads in the area.

Q. They are all surface crossings.

A. You said overhead railway.

Q. I meant overhead crossings.

A. I have not observed this locale so I couldn't tell you whether there were surface streets across the top of the railroad or whether there were underpasses or overpasses.

Q. Or how many or what streets they were on?

Mr. Vaughn: I object to that. He didn't say that.

Mr. Coyle: Q. Do you know how many there were, or what streets they were on?

A. By a physical observation I have not made it. However, looking on the map it is apparent that there are many streets which are crossing that particular railroad.

Q. Both of these railroads?

A. That's right.

Q. Now referring to the material contained between Pages 1 and 7 of your affidavit, were all the conclusions in that portion of the affidavit based upon this work and the studies which took place prior to the time you became associated with this project?

A. Give me a moment to look through it.

Q. Sure.

A. Certain statistics on Page 4, Item 2, Line 24, were [fol. 83] computed subsequent to the—were computed by men under my direction.

Q. Which statistics were those?

A. The total population, the areas of overlay was 104,320 if a 1.5-mile adjusted radius was used and 237,390 if a two-mile adjusted radius was used. These totals represent less than 1.6 per cent and 3.6 per cent respectively of the total population of 6,668,975 people who inhabit the Los Angeles metropolitan area as of the date of the merger.

Q. To what extent did you or people under you compute these figures?

A. The basic data was already compiled but they had not proceeded with the analysis to determine what per-

centage the people in the adjusted radius constituted of the total population.

Q. In other words, all you did was compute the 1.6 and 3.6 per cent; is that correct?

A. That is correct. Based on the basic data developed.

Q. But the 104,320 people in the one-and-a-half-mile adjusted radius and the 237,390 people had been computed by them.

A. This is based on the figures given in the affidavit.

Q. And they had been ascertained——

A. They had been ascertained but not totaled.

Q. So you just took their papers and totaled them up [fol. 84] without going into the basis for the adjustments; is that correct?

Mr. Vaughn: In making this calculation that he is now referring to?

Mr. Coyle: Yes.

The Witness: In this calculation I took their figures, added up the totals, these two different draw overlap areas and made the computation.

Mr. Coyle: Q. Now you have a total population of 6,668,975 people. As of what year was that the population in the Los Angeles area?

Mr. Vaughn: This was as of the date of the merger.

Mr. Coyle: I am asking the witness.

Mr. Vaughn: The document says it.

Mr. Coyle: Q. As of the date of the merger. Is that a census figure as of the date of the merger?

A. Well, again the particular figure was developed by the staff I had and they took this from data available. I am sure that part of it came from the census, because if the census was not taken at that exact moment the figure had to be interpolated.

Q. When did the merger take place, Mr. Bouquet?

A. March 28, 1960.

Q. You don't know when the last census was prior to March 1960?

A. As stated previously, I don't recall the exact date. [fol. 85] Q. Do you know whether the populations in these adjusted radii were projected from any census?

A. The figures as indicated on the chart I did not participate in the determination of.

Q. Other than that everything in this portion of your affidavit between Pages 1 and 8 is based on work done prior to the time you were associated with the project.

A. No. On Page 7, Line 13 it discusses the last overlay prepared as a basis for additional information, November 1961. I participated in an overall supervisory capacity during the gathering of the data indicated here regarding discount houses. Again Tibor Fabian was in complete charge and I was acting as liaison for the Los Angeles staff with the New York central staff for the work on the initial gathering of the data.

Q. Is there anything else in this portion of your affidavit, between Pages 1 and 8, which is based on something other than work done prior to the time that you joined the project?

The Witness: On a quick look through I cannot see any other, Bill. Do any come to your attention?

Mr. Vaughn: You are testifying, Mr. Bouque.

The Witness: Based on a review again of the affidavit, with the two exceptions noted previously—other than the two exceptions noted all the data was gathered and written up prior to my participation in the study.

[fol. 86] (A short recess was taken.)

Mr. Coyle: Q. Referring to Page 8 of your affidavit, you state that you have made certain statistical charts and tables and then in parentheses you refer to figures which were compiled in the manner explained in Paragraph 20, Pages 24 to 25, and in Paragraph 19, Pages 22 to 24, of the document entitled "Statement In Support Of Defendant's Proposed Exhibits." Do you have a copy of that document entitled "Statement In Support Or Defendant's Proposed Exhibits"?

A. Yes.

Mr. Vaughn: I will supply you with a copy.

Mr. Coyle: Q. Now referring to Page 24 of that document, and referring specifically to the column on Line 4 marked "Total Food Sales" and referring to the item on

Line 6, of \$1,303,948,000, can you tell me what products are contained in those sales?

A. I can tell you generally of the items included in the food sales would be the grocery staples, the dairy products and meat.

Q. Excuse me for interrupting. Can you define "grocery staples" for me?

A. Let me say there are the non-negotiable items, which would be groceries, I am thinking in terms again as a layman, of the canned items, dried box items and things of that nature.

Q. Excuse me again for interrupting. Would you include [fol. 87] clude packaged soap chips?

Mr. Vaughn: I object to the question on the ground that it assumes facts contrary to the statement which says he took this from another source, the Bureau of Census, plus certain projections.

Mr. Coyle: I am asking him what items did the Bureau of Census include in this category of total food sales.

The Witness: I would have to refer at this particular point to the actual census figures to itemize the items included by the U. S. Bureau of the Census.

Mr. Coyle: Q. What book of the U. S. Bureau of the Census did you get?

A. 1954 and 1958.

Q. Did you get the 1948 book of the Bureau of the Census?

A. No. The estimates—For the years as stated in the affidavit, for other years—

Q. Which page and which line?

A. Page 23, Line 1. "For other years total grocery store and food sales were estimated. These estimates were based on the assumption that such sales increased at an even rate between the census years 1948, '54 and '58—that such sales increased at a median rate between the census years 1948, 1954 and 1958."

Q. I ask you, did you get census figures for 1948?

A. No. The figures were estimated based on the [fol. 88] assumption that sales increased at an even rate.

Mr. Vaughn: Do you understand his question?

The Witness: Apparently I don't.

Mr. Coyle: Q. I asked you if you got census figures for the year 1948. You say you estimated them on the assumption that sales increased at an even rate between 1948, 1954 and 1958. Without being argumentative, it would seem that you would have to have census figures for '48.

A. I misinterpreted your question. I had the census figures for '48, '54 and '58, and then between these periods we assume they came at an even rate and we extended this for the period beyond the '58 census.

Q. Now my question to you is: What products were included in this total food sales for the year 1948, where you began your projection?

Mr. Vaughn: If you know, Mr. Bouque.

Mr. Coyle: Q. I am asking you if you do know.

A. I do not know precisely all the products included.

Q. Do you know the volume of the census reports in which you ascertained these figures?

Mr. Vaughn: The volume?

Mr. Coyle: Q. From what document did you get the 1948 figure that you used to begin your projection?

A. I can't tell you the exact name of the report. I would have to refer to it. I do not know the exact title at this point. There is too much time that has gone on. [fol. 89]

Q. Do you know whether or not Census publishes a figure for food sales in the Los Angeles metropolitan area in billions of dollars?

A. In billions.

Q. A dollar food sale figure for the Los Angeles area?

A. For what periods?

Q. Published for 1948, 1954 and 1958.

Mr. Vaughn: May we go off the record a minute?

Mr. Coyle: Yes.

(Discussion off the record.)

Mr. Coyle: Q. Does this figure which you list for the year 1954 purport to be the total food sales in the area or total food store sales in the area?

Mr. Vaughn: If you wish to have my stipulation, Mr.

Coyle, I will stipulate it is total food store sales, composed of grocery stores, delicatessens, meat markets and dairy.

Mr. Coyle: I am asking the witness.

The Witness: I would say that the total figure there indicates the total food sales in the grocery stores at that particular period.

Mr. Coyle: Q. Which figure is this now?

A. The figures on Line 6 on Page 23.

Q. Line 6 on Page 24?

A. 24, sir.

Q. Line 6 on Page 24, the first figure indicates total [fol. 90] grocery store sales; is that correct?

A. That is correct.

Q. And the second column, is that total food sales or total food store sales?

A. Total grocery sales—

Q. That is total grocery store sales?

A. It is, as indicated on Lines 8, 9 and 10, Page 23, the list prepared shows the total list of grocery store sales and total food sales enjoyed by each of the chains.

Q. That is my question, whether or not you purport to be showing total food sales or total food store sales.

A. Let me double check my figures.

It is time that I have to break off and I can check these to be absolutely sure when we return.

Q. Before you leave let me get on the record then that I would appreciate it if you would also ascertain for us whether or not when you adjust these theoretical draw areas to find the adjusted draw areas whether you exclude all the population within the areas or whether you only exclude part of the population within the areas encompassed by the barriers in the circles.

And I would also appreciate it if you would be prepared to tell us for the years 1948, 1954 and 1958 the census figures which you used for total grocery store sales and total food sales, or whether that is total food store sales for those same years and the census source from which [fol. 91] you obtained those figures.

(Whereupon at 6:00 o'clock P.M., Tuesday, May 28, 1963 an adjournment was taken until 9:00 o'clock A.M., Tuesday, June 4, 1963.)

[fol. 92] (Whereupon, at 9:00 o'clock A.M., Tuesday, June 4, 1963, the taking of the deposition of Roy Lawrence Bouque was resumed at the same place, the following persons being present:)

APPEARANCES OF COUNSEL:

For the Plaintiff: James J. Coyle, Esq. Attorney for the U. S. Department of Justice, Antitrust Division, 1602 Federal Building, Los Angeles, California.

For the Defendants: Johnson, Bates & Sheffield, Esqs. and O'Melveny & Myers, Esqs. William W. Alsup, Esq. and William W. Vaughn, Esq. By: William W. Vaughn, Esq., 433 South Spring Street, Los Angeles, California.

Reported by: Harold M. Leibovitz, C.S.R.

[fol. 93] ROY LAWRENCE BOUQUE, having been previously duly sworn, deposed and testified further as follows:

Direct examination. (Continuing)

By Mr. Coyle:

Q. Mr. Bouque, have you secured figures showing the total grocery store sales and total food sales for the year 1948?

A. I have some revised figures here for the total grocery store sales and the total food store sales during the period 1950 through the first six months of 1960.

Q. You say total food store sales; is that correct?

A. That is correct.

Q. It is not total food sales, it is total food store sales.

A. The meaning was intended to be total food store sales.

Q. And every place in your affidavit where you use the words "total food sales" you are referring to "total food store sales."

A. That's correct.

Q. What do you define as a food store?

A. A food store is as defined in the 1958 Census of Business Retail Trade, California, in Appendix I, Food

[fol. 94] Stores. It is under the major group 54, which indicates that it includes grocery stores, including delicatessens, meat markets, fish markets, fruit and vegetable stores, candy, nut and confectionery stores, dairy product stores, retail bakeries manufacturing, retail bakeries non-manufacturing, egg and poultry dealers and others.

Q. Are there any stores which sell groceries and related products which are not included in the category of food stores?

Mr. Vaughn: Would you read that back, please?

(The reporter read the pending question.)

The Witness: Well, by definition the food store category in the Census indicates that these are the stores that are included in the figures presented in the exhibit. The other category includes establishments not elsewhere classified, primarily selling specialized lines of foods such as coffee and tea stores, spice shops, health food stores and so forth.

Mr. Coyle: Q. Are they included in the food store category?

A. They are included in the food store category.

Q. Department stores that sell any groceries and related products?

A. It is not indicated in here. However, by definition food stores include establishments primarily selling food for home preparation and consumption. There is not a [fol. 95] separate category spelled out. I am not able to say positively at this time just how it was categorized by the census people.

Q. My question was: Do department stores sell any groceries and related products?

Mr. Vaughn: What department stores?

Mr. Coyle: Q. Do any department stores in this area sell any groceries and related products?

Mr. Vaughn: I object to the question as calling for a conclusion as to what a department store is.

Mr. Coyle: I am asking the witness.

Q. Does every store which sells groceries and related products fall into that category of food stores?

A. Does every store selling groceries fall into this category?

A. Yes.

A. I assume that the stores, department stores, would not be categorized as a food store even though they might sell some specialty item.

Q. They might sell some groceries and related products?

A. They might sell—I am trying to think of the word—exotic foods and things of this nature. But this is really beyond—I would say they would not be categorized—My assumption is that they would not be categorized as a food store.

Q. But do they sell any grocery or related items?

A. Be more specific.

[fol. 96] Mr. Vaughn: You are asking if any department store in the Los Angeles area sells grocery items and related items?

Mr. Coyle: Yes.

Mr. Vaughn: In Los Angeles what do you mean by "department stores"?

Mr. Coyle: Q. I will give you one, the Broadway. Does the Broadway sell any groceries and related products?

A. I don't know.

Q. Have you ever been in the Broadway?

A. Yes. I very seldom go into the Broadway. I go into a specialty store for my clothes. I do know that some of these department stores have some of these exotic items. I cannot spell it out.

Q. Do they sell drug items that are sold in grocery stores?

Mr. Vaughn: If you know, Mr. Bouque.

The Witness: Well, here again you are taking a real broad category of items. What is a drug item? Department stores sell various kinds of items.

Mr. Coyle: Q. Do they sell tooth paste?

Mr. Vaughn: Isn't that outside the issues in this case, Mr. Coyle? I will object to it on that ground.

Mr. Coyle: I don't think it is. I want to know what "total food sales" means.

The Witness: The total food sales is indicated by the census figures which spells out these particular items. It [fol. 97] goes right down the list what is included by food stores, and the census spells it out. I will reiterate, if necessary, the categories of stores that are included in their categories as food stores.

Mr. Coyle: Q. Do food stores sell any non-food items?
A. Yes.

Q. And that is included in this total sales figure?

A. That is correct.

Q. Does a food store category include grocery store sales?

A. That is correct.

Q. How did you arrive at this figure \$1,303,948,000?

Mr. Vaughn: For what year?

Mr. Coyle: For the year 1950 of the total food sales.

The Witness: The total food sales in the year 1950 was arrived at by taking the census figures of 1948 for total food store sales and the total food store sales from the census figures for 1954.

Mr. Coyle: Q. What was the total food store sales for the year 1948?

A. The total food store sales for 1948 in terms of thousands of dollars is 1,094,706.

Q. What was it for 1954?

A. For 1954, again in terms of thousands of dollars, it is 1,722,540.

Q. Then what was it for 1958?

[fol. 98] A. For 1958 it was 2,216,472.

Q. How did you arrive at the figure 1,303,948 for 1950?

A. To arrive at the figure we subtracted the figure for 1948 from 1954. The difference was, again, in terms of thousands of dollars 627,834, which meant an average increase per year of 104,639. And then adding this last figure to the '48 figure and each subsequent year you will arrive at the total figure for 1954.

Q. Would you repeat that average figure for me, Mr. Bouque?

A. The average increase was 104,639.

Q. Then you would add that 104,639 to 1,094,706,000; correct?

A. That is correct.

Q. And adding that to this figure you would get \$1,199,335,000 for 1949; is that correct?

A. Three hundred forty-five.

Q. And you get 1,303,984,000 for 1950?

A. That is correct.

Q. And you got 948 on your table, I believe.

A. That is a typographical error.

Q. It should be 984?

A. Right.

Q. That is a typographical error, you say.

A. That is correct. Because when you add the figure [fol. 99] 104,639 to the 1950 total you will come up with 1,408,623,000.

Q. Then you would add 104,639 to your 1950 figure and you would get \$1,408,623,000.

A. That is correct. Doing that each year to '54.

Q. From then on you add \$104,639,000 up until 1954.

A. That is correct.

Q. I was confused because of that one typo.

A. That typographical error threw you off.

Q. And then between 1954 and 1958 what figure did you use?

A. We took the figure for 1958 and subtracted the figure for 1954, and using this same technique took the average increase per year of \$123,483,000 and added it to the '54 and then cumulative up to 1958.

Q. You added—

A. We added the 123,483,000, which is the average increase per year, to the 1954 figure of 1,722,540,000.

Q. What figure did you add to that?

A. We added 123,484,000.

Q. When you add this to 1,722,540,000 the figure of 123,483,000—

A. For 1954.

Q. We are talking about food store sales.

A. The figure for 1955 would be 1,722,540,000 plus 123,483,000.

Q. What does that give you?

[fol. 100] A. That would give you 1,846,023,000.

Q. And you show 1,827,734,000 on this tabulation.

A. This figure would have to be adjusted to the 1,846,023,000.

Q. Then what figure would you add to the 1,846,023,000?

A. We would add 123,483,000 to the 1,846,023,000.

Q. What would that give you?

A. It would be 1,969,506,000. And then adding the same figure, 123,483,000 you come up for 1957 with 1,092,989,000. And then adding the 123,483,000 to the '57 figure you come up with the 1958 census figure of 2,216,472,000.

Q. So all of these figures on your affidavit are incorrect.

A. The figures have to be adjusted because the census changed—in obtaining the figures for '58 the staff man failed to turn over a page and left out three categories, which is the difference between the 2,143,318. So this difference had to be added to that figure to come to the correct figure of 2,216,472,000. And therefore the figure has to be adjusted for the '54 to '58 period in total food sales.

Q. Total food store sales.

A. Total food store sales.

Q. What census book did you get this figure of 2,216,472,000 from?

[fol. 101] A. We got this from the 1958 Census of Business Retail Trade of California, Page 522, Table 103.

Q. Could I see it, please?

How did you get the figure of 1,097,663,000 for the year 1950 for grocery store sales?

A. The same technique was used for arriving at the grocery store sales as for the interim years on the total food store sales. We took the figures from Table 102, Page 4—05 of the 1948 census figures, which were in thousands of dollars, 920,335. And then taking the figures in the 1954 census, which was 1,487,116, a difference of 566,781, or an average increase per year of 94,463. That figure was added to the total grocery store sales figures up through the 1954 figure, which was obtained from the census figures.

Q. Did you have any basis for assuming that the increase in food store sales would be the same each year in the period 1948 to 1954?

A. It is difficult to determine what the actual trend of the sales were between these periods. And we took the

approach, because there were no figures available in intervening years, of taking an even spread in the actual dollar sales between the two years.

Q. You conducted no studies or did no research to determine whether that was a constant increase or whether it was a sporadic increase?

A. We took the available sales figures from 1948 and [fol. 102] available figures for 1954.

Q. You mean the census figures.

A. The available census figures for those two years and then because there were no census figures in between those two years, we assumed for purposes of this computation that there was an even trend. It is possible that it did not increase at an even trend for every year.

Q. Were there any recession periods in the economy during that period? Was 1951 a recession year?

A. What do you mean by "a recession year"?

Q. Economic setbacks, unemployment and average income is down.

A. I do not know exact figures. We have had problems in various years. Unemployment we have with us consistently.

So here again just how much this would affect the sales figures is entirely problematical as to your judgment. So rather than attempt to second guess what happened in each year, since people have to continue to eat, we assume an even increase for purposes of trying to identify a trend.

Q. You made no adjustments for changes in the economic picture for recessions?

A. The adjustments were made by bringing the figures into line for the two accurate figures we had. In between this time it was only a supposition.

Q. Were there any strikes in the retail food industry during the period 1948 to 1954?

[fol. 103] A. I believe—The retail trade industry I know has had a number of strikes. What happened in those specific years I do not know.

Q. Do strikes affect the total sale of groceries and related products in the area?

A. This is entirely hard to say since the people have to

eat and all the stores do not go out at the same time. So people manage to get food by going to other stores.

Q. Did the consumption go down during the strike period?

A. I think this is beyond the scope of our survey, determining if people eat less during a strike period.

Q. Did the population increase less in the same period on a year-to-year basis?

A. The population has increased. I do not recall the figures offhand, whether it increased at an even base at this point.

Q. You made no inquiry into the population trends when you assumed that you had this average increase during this period of six years?

A. The population trend did increase during this period. There has been a constant influx of people into this particular area.

Q. But you don't know on a year-to-year basis whether it is consistent or whether it is sporadic?

A. I would have to look at the figures at this point. [fol. 104] To my recollection it has been thoroughly stable. Now, what is stable is something else.

Q. In 1948 food store sales were 1,094,706,000 and the grocery store sales were 920,335,000. Would it be correct to say that sales of food stores other than grocery stores were 174,371,000?

A. What was your figure again?

Q. 174,371,000.

A. That is correct.

Q. That is sales of food stores other than grocery stores?

A. Food stores other than grocery stores.

Q. And then in 1954 could you tell me what the sales of food stores other than grocery stores was?

A. 235,424,000.

Q. And then in 1958 what was the sale of food stores other than grocery stores?

A. 208,159,000.

Q. So that in the period 1954 to 1958 the sales of food stores other than grocery stores declined.

A. That is correct.

Q. How did you arrive at the figures for the years 1959 and 1960 for food store sales?

A. The food store sales for 1960 were stipulated at 2,500,000,000.

Q. What do you base that assumption on?

[fol. 105] A. This was stipulated in a court order.

Q. Which court order?

A. As per Paragraph 26 on Page 6 of the pretrial conference order.

Q. What does it say? What does that pretrial conference order say?

A. It stipulates that the level of total food store sales to be at 2.5 billion dollars.

Q. For what year?

A. For 1960.

Q. Does it say that in that paragraph in the order?

Mr. Vaughn: I will object to the question. The paragraph speaks for itself.

Mr. Coyle: I want to know what the witness read in that paragraph.

The Witness: This particular figure was given to me by M'Melveny & Myers.

Mr. Coyle: Q. Have you ever read the pretrial conference order?

A. I have not read the pretrial conference order.

Q. So this is based entirely upon a figure that was given you by O'Melveny & Myers.

A. I base this on a figure given me by O'Melveny & Myers from the pretrial conference order.

Q. And they represented to you that the pretrial conference order stated that the total food store sales in [fol. 106] 1960 was 2.5 billion dollars?

A. They indicated to me that this was the amount agreed upon in that pretrial conference order.

Mr. Vaughn: I will so stipulate that we said that to him.

Mr. Coyle: Q. That is the only basis that you have for making these conjectures?

A. That is correct.

(A short recess was taken.)

Mr. Coyle: Q. Mr. Bouque, do you know whether household supplies are sold in grocery stores?

A. What do you mean by household supplies? If you mean cleaners and soaps and so forth, yes.

Q. That is correct.

A. Yes.

Q. Are they sold in any stores other than food stores?

A. Yes.

Q. Do you know whether drugs and sundries are sold in grocery stores?

A. When you say "grocery store," are you including supermarkets and things of this nature which handle many departments?

Q. Do you include supermarkets in your category?

A. I do, yes. They do sell drugs.

Q. Are those items sold in stores other than food stores?
[fol. 107] A. Drugs are definitely sold in other than grocery stores.

Q. And sundries?

A. That is correct.

Q. Are fruits and vegetables sold in stores other than food stores?

A. They are sold but they are not at such as stands and farmers. They are not included in these figures, the census figures.

Q. Are frozen foods sold in stores other than grocery stores?

Mr. Vaughn: Now other than grocery stores.

The Witness: Other than grocery stores?

Mr. Coyle: Q. Yes.

A. Yes, they can be sold in others.

Q. Are they sold in stores other than food stores?

A. Such as?

Q. Frozen strawberries, are they sold in drug stores?

A. I have never been in a drug store that sold frozen strawberries.

Q. Is bakery goods sold in stores other than food stores?

A. I am trying to recall seeing bread in a drug store but I don't recall it.

Q. Can you buy bread at a gas station?

A. This would be a highly isolated instance. I don't [fol. 108] know whether it is done in the L.A. area. I have seen it done.

Q. You don't think gas stations sell many grocery items?

A. No, I don't.

Q. How about milk depots?

Mr. Vaughn: What about them?

Mr. Coyle: Q. Drive-in milk depots, do they sell grocery items?

A. Are you referring by "milk depots" to these new small drive-in stores that have been established on corners with access?

Q. Yes.

A. They sell a wide range of items other than milk.

Q. Are they included in the food store category?

A. I would assume that the census picked up these particular figures. If they had inquiry about them they would be picked up.

Q. How about soaps and detergents, are they sold in stores other than food stores?

A. I have seen some kind of soaps sold in drug stores.

Q. Don't most stores carry laundry detergents?

A. On some of these larger drug stores that handle a wide range of products they do carry all types of items, including soaps of all nature and the like.

Q. What were your increments between the year 1958 [fol. 109] and 1959 on food store sales?

A. On food store sales the increment between 1958 and 1959 was 141,764,000.

Q. What was it on grocery sales?

A. The increment difference between 1958 and 1959 was 149,455,000.

Q. Grocery sales?

A. Grocery store sales. That is correct.

Q. Would you give me that again?

A. The increment of grocery sales added to the 1958 figure was 149,455,000.

Q. How did you arrive at this increment of 149,000,000?

A. We arrived at this increment in the following man-

ner: We took the stipulated total food store sales for 1960—

Q. You mean you took the sales that O'Melveny & Myers told you was stipulated.

A. That is correct. Using this figure for the first six months we divided that figure—rather we used that figure, the 2,500,000,000 to represent the entire year for 1960. We then, looking at the trend of food store sales and grocery store sales for the period 1954 to 1958, we extended the increase of grocery sales for these succeeding periods, one a full year and one a six-month period, as nine-tenths of 1 per cent increase. Because during the period 1954 to 1958 there had been a percentage increase [fol. 110] of 4.3 of grocery sales to food store sales. This is about 1.1 per cent increase per year on an average basis.

Being conservative we said that it probably increased .9 per cent for this 18-month period or, shall we say, two-year period. Then using that percentage we applied it to the stipulated figures and to the computed figure for the food store sales to arrive at the grocery store sales for those two periods.

For example, the percentage of grocery store sales to total food store sales was computed to be 91.5 for 1959. We applied this figure to the 2,358,236,000. We increased that figure 91.5 by the nine-tenths of 1 per cent to 92.4 for 1960. Applying this figure to the stipulated sales figure for total food store sales we arrived at 2,310,000,000 sales. Then taking half of that you arrive at the sales for the first six months of 1960.

Q. Have you ever made any study to determine what percentage of total sales of grocery stores and related products are accounted for by food stores?

A. The review made was based on this relationship between 1954 and 1958 figures.

Q. The question I asked you was: Have you ever made any study to determine what percentage of total sales of groceries and related products are made by food stores?

A. I reviewed these figures in the census to arrive at this conclusion.

[fol. 111] Q. Did you compute that the total food store

sales is the same as total sales of groceries and related products?

Mr. Vaughn: I object to the question as calling for a conclusion of this witness as to what groceries and related products means. I might know what it means.

Mr. Coyle: Q. Do you know what that means?

A. I would like to keep the definition within the census context because these are the figures used to form a basis which we refer to.

Q. You are using census figures up to 1958.

A. That is correct.

Q. After 1958 you are not using census figures.

A. We are using the census figures to project the trend because the exact figures are not immediately available.

Q. You are using, in addition to the census figures, one assumed figure that O'Melveny & Myers supplied you with and represented to you to be total food store sales.

A. That is correct.

Q. And they represented that it was total food store sales.

A. That is correct.

Mr. Vaughn: And that was our understanding at the meeting of the pretrial conference.

Mr. Coyle: Q. They didn't state to you that it was total sales of groceries and related products?

A. No. They indicated——

[fol. 112] Q. Go ahead.

A. They indicated to me that the figure, the 2,500,000,000 coincided with the figures given in the census as total food store sales.

Q. The census doesn't publish any figures for total sales of groceries and related products in the Los Angeles metropolitan area, does it?

A. The census provides in this retail trade area statistics, it provides the figures covering the items which I itemized earlier in this deposition.

Q. Covering types of stores, not items at all, but type of stores; isn't that correct?

A. The stores that sell this type of item.

Q. Categories of stores?

A. Categories of stores.

Q. But groceries and related products are sold by stores not in these categories, are they not?

A. I think you would have to be more specific to say what you mean.

Q. Soaps and household supplies, candies and liquor and these other items are sold by stores other than food stores, are they not?

Mr. Vaughn: Objection. It assumes a conclusion, really, that groceries and related products includes soaps, detergents and liquors.

Mr. Coyle: It doesn't assume a conclusion at all.
[fol. 113] Mr. Vaughn: It certainly does.

Mr. Coyle: Q. If I tell you the pretrial conference order defines groceries and related products as groceries, meats, produce, bakery goods, dairy products, delicatessen products, frozen foods, fruits, vegetables and household supplies and drugs and sundries—

Mr. Vaughn: Are you reading from the pretrial conference order?

Mr. Coyle: Yes, sir.

Mr. Vaughn: May I see it, please? What is your question?

Mr. Coyle: I am asking the witness if any of those items are sold by stores other than food stores.

The Witness: Candy, nuts and soaps are sold in stores other than grocery stores.

Mr. Coyle: Q. Other than food stores. Are they sold in drug stores?

A. Yes.

Q. Department stores?

A. Those items are sold to the extent to which they are sold. I am not capable of saying.

Mr. Vaughn: Have we just expanded our line of commerce to include all liquor store sales and all specialty store sales?

Mr. Coyle: I am asking the witness a question. I am asking the witness how he assumed that a statement that [fol. 114] total sales of grocery stores and related products in the Los Angeles metropolitan area is the same

thing as total food store sales in the Los Angeles metropolitan area.

Mr. Vaughn: All right. It sounds to me, though, from the import of your question, that you are now including in the universe all the drug store sales, all the liquor store sales, all sales of groceries and related products from no matter what establishments. Those figures don't have any relevance, if that is your interpretation of the line of commerce.

Mr. Coyle: I am just trying to find out what this witness did to arrive at these figures.

Q. You say you related your projected total food store sales figure to the total grocery store sales figure on the basis of a percentage of .9 something.

A. .9 per cent. It would be percentage in 1958 of grocery store sales to total food store sales, which was 90.6.

Q. In 1958.

A. In 1958.

Q. What was it in 1954?

A. In 1954 it was 86.3.

Q. In 1948?

A. In 1948 it was 84.1.

Q. Will you repeat that?

A. '48 is 84.1. In 1954 it was 86.3 and in 1958 it was 90.6.

[fol. 115] Q. You use 90.6 in your computations beyond 1958

A. Use 90.6 in our computation beyond 1958.

Q. I think we established that sales of food stores other than grocery stores in 1950 was 174,000,000.

A. What year did you say?

Q. 1950 it was 174,000,000.

A. 194,722,000.

Q. In 1954 it was 231,000,000, I think.

A. 235,424,000.

Q. In 1954 it was 208,000,000, I believe.

A. That is correct.

Q. In 1960 under your figures what would the sales of food stores other than grocery stores be?

A. Are you speaking of the first six months or the entire year?

Q. For the entire year.

A. It would be 190,000,000.

Q. So that in the period between 1954 and 1960, according to your calculations the sales of food stores other than grocery stores declined by 45,000,000; correct?

A. Approximately that figures, yes. Would you restate that question?

Mr. Vaughn: Would you read it back please, Mr. Reporter.

(The reporter read the pending question.)

The Witness: 45,000,000 between 1950 and——

[fol. 116] Mr. Coyle: Q. 1954 and 1960.

A. That is correct.

Mr. Coyle: Off the record.

(Discussion off the record.)

Mr. Coyle: Q. These tables——

A. Reflect all the figures that we have been talking about here.

Q. —which you describe in your affidavit, Pages 8 through 12, were these tables prepared under your supervision?

A. Yes, they were.

Q. And this is the work that you were responsible for, that is personally responsible for, as an employee of Lybrand, Ross Bros. & Montgomery?

A. That is correct.

Q. Now referring to this exhibit showing percentage of total grocery store sales by various groups of chains in the Los Angeles metropolitan area, you state that the source is records of companies obtained under court order; two, Los Angeles Examiner estimated sales, chain grocery stores in the Los Angeles primary area, 1950 to 1960. How did you use the Los Angeles Examiner in preparing this table?

A. To get a running start, so to speak, the Examiner publishes these sales figures referred to each year and they list about 25 to 28 stores.

Q. Chains of stores?

A. Chains of stores. Using these figures to find the

[fol. 117] stores that are in this top group, we then used the records obtained under court order from the FBI and took those figures, where they were available for the stores in the top 20. Where the sales obtained under court order did not go back to 1948, in a few instances we had to use the Examiner figures, which are based on either information they have garnered from the particular chain or their estimate of the sales based on their experience in the area.

Q. What years did you use the Examiner data?

A. We used the figures obtained under court order for practically all the figures. There were certain figures used in the 1948-50—it is in the 1948 figure a few stores were used. We used the Examiner figures.

Mr. Vaughn: He is not talking about this exhibit now, he is talking about this one.

The Witness: He said 1948. You were looking—

Mr. Coyle: Q. I am talking about this exhibit (indicating). Which years, I am asking you, did you use Examiner data?

A. I would have to refer to the detailed records to tell exactly at this particular point. I know that the figures, for example referring back to the comparison of sales from 1948 to 1960 of the 20 largest chains for the Great Atlantic and Pacific Tea Company we had to use the Los Angeles Examiner estimated sales figures. So we had to use those Examiner sales figures in specific instances where [fol. 118] the figures had not been obtained under court order for individual stores. There were very few that we used.

Q. But you can't state now which instances?

A. I would have to go back into the detailed work papers to do it. But I know there were very few, because most of the figures were available from the records obtained under court order.

Q. Did you ever check the actual figures with the figures published in the Los Angeles Examiner?

A. Which figures are you referring to?

Q. For specific chains. Did you ever compare Ralphs figures with the Examiner's figures?

A. As I stated previously, we used the FBI figures

furnished under court order whenever they were available. There were fluctuations between the figures provided by the Examiner and the actual figures obtained under court order in some instances.

Q. Now referring to this comparison of sales from 1948 to 1960 of the 20 largest grocery chains in the Los Angeles metropolitan area, using June 30, 1960 ranking, you list a figure for Safeway Stores of \$130,000,000 in 1948. Was this figure obtained from the Los Angeles Examiner?

A. No. As stated by the letter "B," the 1948 census sales figures of the top four chains less the actual sales that were available for Ralphs, Mayfair and Von's.

Q. Where did you get the census figures for the top four [fol. 119] chains for the year 1948?

A. The top four figures, the census figures, were furnished by O'Melveny & Myers to us.

Mr. Vaughn: Do you want me to say where I got them?

Mr. Coyle: I will ask the witness.

Q. Did you know that the census has furnished total sales figures for the top four, top eight, top 16 and top 20 chains for the years 1948, 1954 and 1958?

A. Would you repeat that?

(The reporter read the pending question.)

The Witness: I did know that the figures were furnished in 1948 for the top four stores since I was furnished this figure by the O'Melveny & Myers office.

Mr. Coyle: Q. But was that the only census figure that O'Melveny & Myers furnished you?

A. That is the only census figure they furnished us for this particular table, yes. We used other figures under the court order which were obtained from the FBI records, actual sales of these particular stores.

Q. Now referring to this graph showing percentage of total grocery store sales by various groups of chains in the Los Angeles metropolitan area, did you know that the year 1959 was a strike year?

A. I did.

Q. Did that account for the dip in the market shares of these chains from 1958 to 1959?

[fol. 120] A. On a judgmental basis, yes, because the other stores remained open. While the major chains were tied up in the strike there would be some loss of sales.

Q. And does the graph show that in 1960 the chains had gained back their losses?

Mr. Vaughn: I will object to that on the ground that the graph speaks for itself.

Mr. Coyle: I am asking the witness whether he understands that.

The Witness: The graph projects, based on the stipulated sales, the anticipated grocery sales by these stores for the entire year 1960 based on the projection of .9 on an average each year beyond 1958.

Mr. Coyle: Q. The other day, Mr. Bouque, you talked about these barriers to competition in these areas that were marked off. Did you check the records to find out whether you eliminated the entire population living beyond these barriers?

A. I checked with the people who made the estimates and basically they excluded the people beyond the barrier. I emphasized the word "basically" because there are other conditions in some cases and you have to take each one individually, as to whether with some of the people it might have acted as a partial barrier rather than a complete barrier.

Q. In every instance where they used it as a partial barrier is it so indicated in your exhibit?

[fol. 121] A. You have to analyze the situation on each individual chart. They have indicated in many of the instances that certain ones were partial barriers and that a certain pocket of people pass the barrier and so forth. Each one has to be analyzed on its own merits.

(Discussion off the record.)

Mr. Coyle: Q. Referring to Appendix I, coming to Page 21 of your affidavit, you say, "The Long Beach Freeway forms a barrier at the border of the 1.5-mile zone on the west." Was that a complete barrier or partial barrier?

A. That was a complete barrier.

Q. There are underpasses and overpasses across the freeway, aren't there?

A. That is correct, at irregular intervals.

Q. Referring to Page 22 you state, "The Southern Pacific Railroad is a barrier to the north; the freeway is a barrier to the south; and the Alhambra Wash is a barrier to the east." Are all of those complete barriers?

A. You will have to pull out the map and analyze each one to arrive at a figure—or a judgment.

Q. You don't know as of now whether they are a complete or partial barrier?

A. Each one I cannot tell you offhand which one is complete and which one is partial.

Mr. Coyle: Off the record.

(Discussion off the record.)

[fol. 122] Mr. Coyle: Q. Mr. Bouque, I show you copies of the exhibits which you prepared for O'Melveny & Myers in connection with this lawsuit and which show the various stores and your theoretical and adjusted draw areas for the stores and ask you to locate Von's Store No. 4 on those maps.

A. Here is the No. 4 store.

Q. Is this the Long Beach Freeway?

A. This is the Long Beach Freeway.

Q. You designated that as a barrier and considered it a complete barrier; is that correct?

A. That is correct.

Q. Now can you find Von's Store No. 29?

A. (The witness indicated.)

Q. Now referring to the Southern Pacific Railroad, which you designated a barrier on the north, can you find it?

A. (The witness indicated.)

Q. Is that a complete or partial barrier?

A. For what area are you referring to? Are you referring to the 1.5 or the two-mile radius as a barrier?

Q. I am asking you whether you have used it as a complete or partial barrier in adjusting your theoretical draw area.

A. As indicated previously, the basic supposition was used by the people making this evaluation of the adjusted

draw. The basic premise was that the natural barriers tended to form a complete barrier. But when they had to [fol. 123] look at the surrounding environment to determine where it actually became a permanent barrier or not.

For example, you will note on the overlays that just beyond the barrier are five major stores beyond the railroad, which is between these stores and Von's. And in addition there is a lack of direct access to the Von's store.

So in evaluating this one, without itemizing each individual figure, this acts as a substantial barrier for potential customers shopping at the Von's store.

Q. You look at this as a natural barrier?

A. Natural and man-made barriers. Railroads, freeways, those are man-made barriers.

Q. Did you use that as a partial barrier or a complete barrier in adjusting your draw area, or do you know whether you used it?

A. I would have to actually go over all these detailed figures on each individual case to determine whether it excluded everybody or not. As I repeated before, you took the picture as it was based on the distance of the barrier from the immediate store. Based on the competition as to whether this really acted as a complete barrier or not, whether there were roads that provided—People are not going to go across the so-called barrier and drive a circuitous route to Von's ordinarily if there are five or six stores within a very short distance of their homes. [fol. 124] If they were living right here (indicating) and they have to come down here a ways to get to Von's, they are probably going to go to these stores (indicating) unless they have a high preference for a particular store.

Q. Were any surveys made whether they had a high preference?

Mr. Vaughn: I object to that as having been asked and answered.

The Witness: This would be beyond the scope of our work of interviewing individual people.

Mr. Coyle: Q. How did you take into consideration these other stores in the area if you made no interviews?

A. This is a judgmental factor. First of all I know how we do our shopping.

Q. You personally?

A. Yes.

Q. Based upon your own experience.

A. Yes, family experience. I won't go driving a great distance.

Q. That is not much of a universe, is it?

Mr. Vaughn: I object to it as being argumentative.

The Witness: You asked for a judgment and I gave it to you.

Mr. Coyle: Q. This is the judgment that these other people made. You didn't make it.

A. This, as I stated some time ago, was an attempt [fol. 125] statistically to arrive at these draw areas around a given store. And based on observation of the maps, the barriers, the people, the way the streets flow, the way the traffic flowed, based on the streets dead ending against these particular areas, also in reading other material, where people shop, the judgment was made in each case as to what the draw should be.

Q. How much field survey did they do?

A. It was not intended that our work would be in the field talking to people. The men on the job did take several trips to some of the stores in contention. Specifically I do not know which stores but I do know they went into the area and looked at the stores and the immediate vicinity to be aware of what the area was like.

Q. Now referring to this adjusted draw area for Von's Store No. 29, is it your testimony that you would have to check your records to determine whether or not the Southern Pacific Railroad or the freeway to the south of the Alhambra Wash were used as complete or partial barriers?

A. It was my testimony that I would have to pour over the maps and come up with a judgmental figure as to how they arrived at their particular figures.

Q. Wouldn't it appear from the mathematical calculations that they made whether they excluded the entire population or part of it?

A. The drafts of the reports show the total figures. [fol. 126] The calculations are not available here in Los Angeles.

Q. Would they be in New York?

A. The staff, as I indicated earlier, who were out here working on this engagement, after gathering the data they went back to New York and wrote up the report.

Q. At the termination of the previous deposition I think I asked you to ascertain whether these were partial or complete barriers.

A. You asked me, as I understand it, what was the approach used on these barriers. As I mentioned several times, the approach that the individuals who did this, the approach they made—

Q. I was more specific. I asked you to find out cases where they were partial or complete barriers.

Mr. Vaughn: That is completely false, according to my understanding. You asked him whether or not the barriers were regarded as complete or partial.

Mr. Coyle: Yes. That is what I want to know.

Mr. Vaughn: I didn't understand it to be a case-by-case analysis, by any manner of means. It was not my understanding at all. And in my discussions with Mr. Bouque after the deposition I so stated to him. So that was not done. I don't think you made yourself clear, if that was your intent.

Mr. Coyle: Q. I will ask you now. Could you go through this appendix or consult your records and indicate whether each of these are partial or complete barriers?

[fol. 127] A. We could go through it but it would be a tremendous job.

Q. Wouldn't the records in New York show that?

A. I would have to double check on that. A lot of these were worksheet papers. I think the better approach on this thing would be to take a look at these maps—it is going to take a long time—and take the ones that compare with the figures and see what they actually did.

Q. All right, then, you tell me now whether or not on Von's No. 29 the Southern Pacific Railroad was used as a partial barrier to the north or a complete barrier.

Mr. Vaughn: If he knows.

Mr. Coyle: Yes.

The Witness: I don't know offhand.

Mr. Coyle: Q. Can you tell from these maps?

A. I would have to do a lot of figuring. It is going to take some time to figure it out.

Q. Well, sit here and figure, I guess.

Mr. Vaughn: Do you intend to go store by store and have him figure each one?

Mr. Coyle: Sure. I intend to be——

Mr. Vaughn: You will be here until the trial.

Mr. Coyle: We can adjourn the deposition and let him go over to this office and sit down and do it.

Mr. Vaughn: Who is going to pay him for that work?

Mr. Coyle: He is your witness, Mr. Vaughn. He is [fol. 128] simply being deposed.

(Discussion off the record.)

Mr. Coyle: Q. Mr. Bouque, in some instances your Appendix I indicates that you treated certain barriers as partial barriers. Do you know whether they were any instances in which you treated barriers as partial barriers and did not so state in your appendix?

Mr. Vaughn: He asked you whether you know whether there are any such instances.

The Witness: I do not know whether there are any such instances which are not mentioned in the report as I did not do the detailed analysis personally. There are several mentioned in the survey—in the appendix, but I do not know whether all of them have been enumerated.

Mr. Coyle: Q. Do you know whether there were any instances in which barriers were treated as complete barriers in preparing this Appendix I?

A. It appears that the barrier of the freeway to the west of Von's Store No. 4 was a complete barrier. But I would have to again say that I would have to compute them to be absolutely sure for purposes of swearing that that was a complete barrier. Generally they consider a barrier such as this a complete barrier and modified it based on surrounding circumstances.

Q. When you say "they," you mean the people——

A. The people who did the survey.

[fol. 129] Q. You have never rechecked their figures to

ascertain whether they correctly computed these adjusted draw areas?

A. I have not completed the figures in detail, no. It would be a horrendous job to do.

Q. You didn't supervise them when they did it?

A. No. I was no way associated with the work in this initial phase of drawing the maps and so forth.

Q. Referring to Page 16 of your affidavit, did you prepare this portion of your affidavit?

A. You mean did I do the basic research work on this particular store?

Q. Yes.

A. No. This was done during the phase in which they developed the maps and this other information.

Q. When you refer to "they," who was responsible for this portion of the information?

A. Dr. Tibor Fabian was responsible for it.

Q. This hypothetical situation that he put in here?

A. Yes.

Q. Do you know whether he based it on these various publications he lists?

A. That is correct. Each one of these figures that is indicated, such as on Page 16, the total capital required to establish such a supermarket would be \$290,000, asterisk, and the source is Chain Store Age, December 1960, Page 38.

Q. Now referring to this other portion of your affidavit [fol. 130] dealing with discount houses, did you do this portion of the work yourself?

A. Let us define what you mean by did I personally. Again, the discount house work was the second phase here in October of 1961 and was under the direct supervision of Dr. Tibor Fabian. However, at this particular point I was keeping in contact with him and knew what was going on. I was in touch with this particular work.

Q. But he developed the program.

A. He developed the program, wrote the instructions for taking the counts in the store, determine the number of license numbers that should be checked with the Department of Motor Vehicles and directed the men in preparing the map which is furnished as an exhibit.

Q. What did you do with that?

A. I kept myself informed at this time because he was from our central research staff and because this had been going on over an extended period which had been unanticipated at the time. When this work came up in October I kept informed so that I would know what was going on.

Q. Did you know that you were going to sign an affidavit then?

A. At that particular time I was not aware that I would be signing an affidavit.

Q. Or that you would be a witness?

A. At that time, no.

[fol. 131] Q. When did you first learn that you were going to be a witness?

A. Before this affidavit was actually prepared, and I have forgotten the exact time. It is a few months ago when I first learned that I would be giving it since Dr. Tibor Fabian had left our firm.

Q. I am going to ask you, Mr. Bouque, to go through this Appendix I and indicate by letter or otherwise to us which were partial barriers and which were complete barriers.

A. This means every single store or are you going to take a sampling basis?

Q. I really think that when you check into it you will find that you can answer it with one sentence, that they are complete barriers unless otherwise indicated in the appendix.

A. Unless otherwise indicated. This means that I have to go through—

Q. Unless your records show the instructions. I am sure Dr. Fabian must have had some instructions as to what procedure would be followed.

Mr. Vaughn: He has made the request. We will see what we can do.

Mr. Coyle: Otherwise I have no more questions.

[fol. 132] Cross-examination.

By Mr. Vaughn:

Q. Mr. Bouque, during our prior session of this deposition Mr. Coyle asked you what census figures you used

in connection with the preparation of the maps that we have been referring to, that is what population census figures you used in connection with that portion of your study which is summarized on Page 1 through 7 of your affidavit. Have you had an opportunity since that time to determine what census figures were in fact used in that portion of your study?

A. The figures used on the census tracts was the preliminary census report for 1960. The counting was done in April of 1960. We took this preliminary report, PC(1-6).

Q. Where did you obtain these preliminary census figures?

A. The preliminary census figures for the overlay were obtained from the Los Angeles Times, who had an advance copy of the preliminary census report, which they made available to us.

Q. Have you since that time checked those census figures in general with the final 1960 census report?

A. The preliminary figures do not agree exactly with the final census figures. However, in the three, four, five or six tracts that we took the difference between the actual figures and the preliminary figures—or I should say the final report and the preliminary figures was very small.

[fol. 133] Q. If you will refer to Page 4 of your affidavit, Line 28, and to the total population figure 6,668,975, where did you get that figure?

A. That figure was from the preliminary census report which the staff working on the job obtained in August of 1960.

Q. That is the preliminary 1960 census?

A. Yes.

Q. Mr. Bouque, you have revised, have you not, the figures which you used for total grocery stores and total food store sales for the years 1950 through the first six months of 1960 since the first time that you signed this affidavit?

A. That is correct.

Q. And we have inserted substitute pages to reflect the changes that will be necessary in your affidavit as a result of those changes; is that not right?

A. That is correct.

Q. And those changes were based upon your second examination of census figures and computations based thereon; is that right?

A. That is correct.

Q. The affidavit does not include the total universe figures for total grocery store sales and total food store sales which you ultimately used in connection with the preparation of your statistics; is that right?

[fol. 134] A. The year 1948 is what you are referring to?

Q. No. The years 1950 through 1960. Those figures are not set forth in the affidavit, they are set forth in another document to which the affidavit refers; is that correct?

A. That is correct.

Q. And the figures in that other document have now been found to be inaccurate; isn't that right?

A. That is correct.

Mr. Vaughn: I wonder if we could arrange to have Mr. Bouque prepare an exhibit which would show total grocery store sales and total food store sales for the year 1950 through the first six months of 1960 and submit copies of that to the reporter so he can attach it to the deposition, to Mr. Coyle for the government and to ourselves, and then the reporter will mark that document Exhibit 1 to Mr. Bouque's deposition? If that is agreeable with counsel we will do it that way.

Mr. Coyle: That is agreeable with me.

Mr. Vaughn: Q. In other words, Mr. Bouque, you will supply the reporter and all counsel with a copy of this exhibit which will show total grocery store sales and total food store sales for the year 1950 through the first six months of 1960.

A. I will prepare a typed copy of the handwritten draft and supply that.

Q. Those will be the figures on which you based your [fol. 135] computations as set forth in your affidavit and the exhibits referred to therein; is that correct?

A. That is correct.

(The notary public after completion of the deposition was furnished by the witness the exhibit above referred to

and it was thereafter marked Bouque Exhibit No. 1 for Identification and is attached hereto.)

Mr. Coyle: I have some questions.

Redirect examination.

By Mr. Coyle:

Q. Mr. Bouque, referring to Pages 22, 23 and 24 of the document entitled "Statement In Support Of Defendant's Proposed Exhibits," do these pages accurately and correctly set forth the computations which you have used in making the revised list showing total grocery store sales and total food store sales which you are going to submit?

Mr. Vaughn: I don't understand the question. Are you asking if these figures are accurate?

The Witness: The figures on Page 24, which we will be submitting in an additional exhibit to correct the figures, were used—the corrected figures were used in preparing these exhibits.

Mr. Coyle: Q. And were the methods described on [fol. 136] Pages 22, 23 and 24 used to arrive at these corrected figures which you are going to submit?

A. That is correct.

Q. And on Pages 22, 23 and 24, when you use the words "Total food sales" you really mean "Total food store sales"?

A. That is correct.

Mr. Coyle: I have no more questions.

Mr. Vaughn: I have none.

(Discussion off the record.)

Mr. Coyle: The government is agreeable to closing the deposition at this time subject to the understanding that the witness will attempt to ascertain whether these barriers were used as complete or partial barriers in adjusting the theoretical draw areas.

Mr. Vaughn: With the understanding that we do not now at the present time know just how far we will have

to go or just what work will be required or just what records will have to be obtained in order to develop that information. All we are saying is that we will exert our best efforts to complete that job.

Mr. Coyle: With the understanding that if the witness doesn't know himself how they were used he is to try to ascertain what the people who prepared the exhibits did when they prepared them.

Mr. Vaughn: That is my understanding of what he is going to try and do.

[fol. 137] (Discussion off the record.)

Mr. Vaughn: Mr. Bouque, would you be agreeable to waiving the signing of the deposition if counsel for the various parties agree that your deposition without signature may be introduced in court just as if it were signed?

The Witness: I do.

Mr. Coyle: That is agreeable to the government.

Mr. Vaughn: It is agreeable to the defendant.

[fol. 138] STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, HAROLD M. LEIBOVITZ, a Notary Public within and for the County of Los Angeles and State of California, do hereby certify:

That prior to being examined the witness named in the foregoing deposition, ROY LAWRENCE BOUQUE, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that the said deposition was taken down by me in shorthand at the time and place therein named, and thereafter reduced to typewriting under my direction.

I further certify that it was stipulated by and between counsel, with the consent of the witness, that the signature of the witness to the said deposition be waived, and that it shall possess the same force and effect as though read and signed by the said witness.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 6th day of June, 1963.

HAROLD M. LEIBOVITZ, Notary Public in and for the County of Los Angeles, State of California.

BOUQUE EXHIBIT No. 1

Total Grocery Store Sales and Food Store Sales for each of the Years 1950 through 1960 in the Los Angeles Metropolitan Area*

Year	Total Grocery Store Sales \$000	Total Food Store Sales \$000
1950.....	1,109,262	1,303,984
1951.....	1,203,725	1,408,623
1952.....	1,298,189	1,513,262
1953.....	1,392,652	1,617,901
1954.....	1,487,116	1,722,540
1955.....	1,617,416	1,846,023
1956.....	1,747,716	1,969,506
1957.....	1,878,016	2,092,989
1958.....	2,008,313	2,216,472
1959.....	2,157,786	2,358,236
1960 (1st 6 mos.).....	1,155,000	1,250,000

* This table is intended to replace the table appearing on page 24 of the Statement in Support of Defendant's Proposed Exhibits in United States of America, Plaintiff, vs. Von's Grocery Company and Shopping Bag Food Stores, Defendants. Amounts have been computed in the manner described in the statement.

DEFENDANT'S EXHIBIT BH

IN THE UNITED STATES DISTRICT COURT

Civil No. 336-60 C

[Title omitted]

AFFIDAVIT OF GODFREY M. LEBHAR

STATE OF NEW YORK,
County of New York, ss:

GODFREY M. LEBHAR, being first duly sworn, does hereby depose and state as follows:

I am a member of the Bar of the State of New York. Since 1925 I have been the Editor-in-Chief of *Chain Store Age*, a monthly publication dealing with matters of interest primarily to chain store operators and managers of chain stores in all fields. Specialized editions of *Chain Store Age* are published to cover each of the fields in which chain stores play an important role, of which the grocery field is one. I have devoted most of my business life to reporting and interpreting chain store activities. I am the author of "The Chain Store—Boon or Bane?" published by Harper & Brothers in 1932, and "Chain Stores in America, 1859-1950," published by Chain Store Publishing Corporation in 1952. A second edition of the latter appeared in 1958, and a third edition is now in preparation for publication early in 1963.

I am the Chairman of the Board of Lebhar-Friedman Publications, Inc., publishers of *Chain Store Age*, *Shopping Center Age* and *Discount Store News*. I am also Chairman of the Board of Business Guides, Inc. a subsidiary of Lebhar-Friedman Publications, Inc.

Business Guides, Inc. publishes annual directories of chain stores in the United States and Canada. One of such directories covers the grocery field. It is called "Directory of Supermarket and Grocery Chains." Such directories are available for the United States and Canada as a whole or for particular States and regions. The directory covering the State of California, which sells for

\$12 a year, lists the chains doing business there, by county, and provides such additional information as the address of the chain's principal office, the names of its owners, officers and principal buyers, and the number of stores it operates. For the purposes of the directory, a chain is defined as a concern which operates two or more stores.

Business Guides, Inc. maintains a large research staff to keep track, from various sources of information, of the changes which occur in business covered by our directories. These directories are prepared for and used by suppliers and others whose business requires them to know the details of chain store operation. For this reason, it is necessary that our directories be accurate, and we do everything possible to see that they are. Our sales of directories and customer reaction indicate that we are doing a good job in this respect.

For the January, 1962 issue of *Chain Store Age*, I wrote an article entitled "Small Chain Virility a Bar to Monopoly." In this article I attempted to analyze statistics developed by Business Guides, Inc. with regard to the number, size and growth of grocery chains, both large and small, throughout the United States from 1953 to 1961. As a result of that article, I was asked by the attorneys for Von's Grocery Co. to make a similar survey and analysis of grocery chains in Los Angeles and Orange Counties—which two counties are hereafter referred to as "the area." The purpose of this affidavit is to set forth the results of that study.

Because of the reduced geographical scope of this study, the data compiled is more detailed than was practicable in the case of the nationwide study. Indeed I was able, with the cooperation of the Research Director of Business Guides, Inc., to make an actual case-history of each of the 270 chains of two or more stores which were listed for the area not only in our 1953 and 1962 directories but in each of the directories for the intervening years.

For this purpose, we first constructed a master-list identifying the 270 chains in question. Then we broke them down into four categories as follows: (a) 47 chains listed in the area in both 1953 and 1962; (b) 49 chains listed in the area in 1953 but not in 1962; (c) 71 chains

listed in the area after 1953 but not in 1962; and (d) 103 chains listed in the area in 1962 but not in 1953.

The chains in each of these four categories were then broken down into four groups based on the number of stores operated by each. Group I included all chains with 2 or 3 stores in the area. Group II included those with 4 to 9 stores. Group III included those with 10 to 99 stores. Group IV included those with 100 or more stores.

A summary of the terminal data for the years 1953 and 1962, respectively is presented in the following table:

Table 1

Group	No. of Companies			No. of Stores Operated		
	1953	1962	% change	1953	1962	% change
I. 2 and 3 stores.....	56	104	+86%	130	231	+77%
II. 4 to 9 stores.....	30	22	-27%	170	115	-32%
III. 10 to 99 stores.....	9	23	+155%	229	592	+158%
IV. 100 or more stores...	1	1	—	175	147	-16%
Total.....	96	150	+56%	704	1,085	+54%

The statistics contained in Table 1 indicate strongly that the existence of larger chains as shown in Groups III and IV and their growth both in number and size over the last decade has not posed any threat or deterrent to the entry and growth of other grocery concerns. It will be noted that firms with only 2 or 3 stores grew in number from 56 to 104 during the period in question. This represents an increase of 86% as compared to an increase in the number of chains with 4 or more stores from 40 to 46, or only 15%.

Furthermore, when these statistics for the area are compared with similar statistics for the United States as a whole, the vigor and growth of small chains in the area become even more apparent. Table 2, from the study which appeared in the January, 1962 issue of *Chain Store Age* and which has been previously referred to, gives the national picture as follows:

Table 2

Group	No. of Companies			No. of Stores Operated		
	1953	1961	% change	1953	1961	% change
I. 2 and 3 stores....	2,013	2,527	+25%	4,654	5,690	+22%
II. 4 to 9 stores....	587	616	+ 5%	3,040	3,272	+ 7%
III. 10 to 99 stores...	256	258	—	6,069	6,360	+ 5%
IV. 100 or more stores	23	25	+ 9%	14,115	15,310	+ 8%
Total.....	2,879	3,426	+19%	27,878	30,632	+ 9%

A comparison of Table 2 with Table 1 shows that whereas the number of food chains increased 19% and the number of their stores 9%, the number of food chains in the area increased 56% and the number of their stores 54%. Actually, the increases in both instances paralleled the population gain in the respective areas.

Next, from the data in our master-list, supplemented by the records of Business Guides, Inc., we followed the course of each of the 270 chains involved from their first appearance in our directories until 1962. The results are summarized as follows:

Group I (2 or 3 store chains)

Table 1 shows that in 1962 there were 104 chains with 2 or 3 stores each as compared to 56 in 1953. However, this does not mean that only 58 new chains were born in the decade. The grocery business is more dynamic than that. Our records show that at various times between 1953 and 1962, a total of 208 chains of 2 or 3 stores each were doing business in the area. This total consisted of the 56 chains noted in 1953, 5 chains which had 4 or more stores in 1953 but which had only 2 or 3 by 1962, *and 143 new 2 or 3 store chains.*

What happened to those 208 chains in the decade under study? As we have seen, 104, or precisely 50%, were still operating 2 or 3 stores in 1962. Seven of them had expanded and were operating 4 or more stores by 1962, and 27 were operating only one store each by that year. Therefore, 138 of those 208 concerns, or 66%, were still in business in one form or another in 1962. Of the remaining 70 chains, 12 were acquired by other concerns, and 58, or 28%, had gone out of business for reasons which our records do not reveal.

In my opinion, the fact that 147 new 2 or 3 store chains were born in the area during the last decade and that the majority of chains of that size remain in business shows that competition from larger chains does not offer any barrier to the entry and success of smaller concerns, and, moreover, that Los Angeles has seen in the past and can expect to see in the future the emergence of a significant number of new single store operations and

chains to compete for the patronage of an increasing population.

The birth of 147 new 2 or 3 store chains in 10 years is indirect evidence of the prosperity of single store operators. For, while our directories do not contain information concerning grocers who operate only one store, I know from experience and from the history of grocery chains that 2 or 3 store chains do not ordinarily come into the picture fully matured in one year. Almost without exception, such chains are the outgrowth of a successful one-store operation whose proprietor is not content to remain a single store operator and who has the wherewithal to open a new store usually derived from the profits made from his first store.

Group II (4 to 9 store chains)

Table 1 shows a decrease in the number of chains in this Group from 30 to 22 between 1953 and 1962. However our records show that in addition to the 30 chains in the group in 1953, 26 chains entered the group after 1953 and before 1962. Of these 26, 6 were in Group I chains which expanded, and *20 were chains which did not exist as such in 1953.*

This means that at various times between 1953 and 1962, 56 grocery chains in the area had from 4 to 9 stores. Of these 56 chains, 5 dropped into Group I by disposing of their stores, 2 became single store operators, 11 were acquired by other concerns, 8 discontinued operations altogether and 8 expanded to move into Group III, leaving 22 in Group II in 1962.

As an illustration of the growth potential of grocery chains in the area, our data reveals that the 8 companies which had expanded sufficiently to move from Group II to Group III by 1962 were operating a total of 46 stores when first listed but by 1962 had a total of 103 stores! It also shows that the 6 chains which climbed from Group I in 1953 to Group II in 1962 increased the number of their stores from 15 to 33, and that 17 other chains which came into the picture after 1953 and were operating a total of 53 stores when they were first listed were operating a total of 146 stores by 1962. Here, I believe, is

graphic evidence of the virility of small chains in the area and the competitive opportunity available to them.

Group III (10 to 99 store chains)

Table 1 shows that the number of Group III chains increased from 9 to 23 in the period under study. This increase came about as follows: in addition to the 9 chains listed in 1953, 8 chains entered the Group from Group II, one chain climbed all the way from Group I, and 7 chains which were not in existence in 1953 had grown big enough to make Group III by 1962.

This makes a total of 25 chains with 10 to 99 stores each. Of these 25, however, two merged with other concerns, and thus gave us the 1962 total of 23. One of these mergers is the one under consideration in this case. Analysis.

From the foregoing facts and statistics and the detailed study we made of the area, I draw the following conclusions:

1. The retail grocery business in the Los Angeles metropolitan area today is less concentrated and more fragmented than in 1953, as is obvious from the following facts:

a. The number of chain store competitors has increased from 96 to 150, or 56%. The number of their stores has likewise increased from 704 to 1,085, or 54%.

b. The increase has occurred in the number of both large and small chains. Chains of 10 stores or more have increased in number from 10 to 24, or 140%. Chains of 2 to 9 stores have increased in number from 86 to 126, or 46%.

c. The increase in number of competitors is highlighted by the fact that since 1953, 174 new chains were born in Los Angeles. Some of these new ventures failed; some of them were acquired by other concerns; some of them had cut back their operations by 1962; but a significant number of them succeeded, and apparently continue to prosper as independent competitive forces. *Indeed, 7 of the 24 chains operating 10 or more stores each by 1962 were not in business at all in Los Angeles as chains in 1953.*

2. The apparent willingness and ability of grocers to expand and create new chain entities at the staggering

rate of more than 17 a year, and the growth potential of new chains, precludes in my opinion the possibility that the retail grocery business in Los Angeles will become either monopolistic or oligopolistic in the foreseeable future. It must be remembered that in 1953, only 10 chains with as many as 10 stores each were operating in the area. These chains are recognized as being among the best managed, most successful and most aggressive super-market operators in the country. They themselves have engaged in expansion programs of significant proportions since 1953. Yet, 10 years later, instead of having swept aside all competition and being left alone to compete among themselves, these same 10 chains are now faced with the necessity of competing against no less than 14 new chains of 10 or more stores each, a significantly greater number of smaller chains and a host of successful single store operators, of whom many are affiliated with powerful voluntary chains or other cooperative groups.

Moreover, if the past in any way foretells the future, it is obvious that today's small chains and independents will, in many cases, respond to the urge to expand. In such circumstances, it seems inescapable that competition will become even more vigorous in the area, that more entities will be competing and that there is and will be no threat of domination of the market by one or a few firms.

3. The growth of independents into chains and of small chains into larger ones, as reflected in the studies which have been summarized herein, demonstrates convincingly that small concerns don't have to remain small in Los Angeles. If there were any kind of built-in disadvantage by reason of smaller size, the dramatic history of growth expansion and prosperity which is documented herein would not have been recorded.

Godfrey M. Lebhar.

Subscribed and sworn to before me this 11th day of October, 1962. /s/ Patricia Wood, Notary Public.

Patricia Wood, Notary Public for the State of New York, No. 41-4337100, Qualified in Queens County, [Seal.]

Commission Expires March 15, 1963.

Def. Ex. BH.

1902

[fol. 1]

DEFENDANTS EXHIBIT BH

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 336-60-CC

[Title omitted]

Deposition of GODFREY M. LEBHAR, a witness, taken by libellant pursuant to notice, at the offices of Lebhar-Friedman Publications, Inc., 2 Park Avenue, New York 16, N. Y., on May 16, 1963, at 10:00 a.m., before Laurence H. Hennefeld, a Shorthand Reporter and Notary Public of the State of New York.

[fol. 2] APPEARANCES:

James J. Coyle, Esq., and Malcolm F. Knight, Esq., Assistant United States Attorneys Proctors for libellant, Federal Building, Los Angeles 12, California.

Messrs. O'Melveny & Myers, Proctors for respondent Von Grocery Co., 433 South Spring Street, Los Angeles, California. By: William W. Vaughn, Esq., Advocate.

It Is Hereby Stipulated and Agreed, by and between the proctors for the respective parties herein, that the signing, sealing, filing and certification of the within deposition be waived.

It Is Further Stipulated and Agreed that all objections, except as to form, are reserved to the time of trial.

GODFREY M. LEBHAR, called as a witness by libellant, being first duly sworn by the Notary Public (Laurence H. Hennefeld), testified as follows:

Examination.

By Mr. Coyle:

[fol. 3] Q. Mr. Lebhar, would you state your full name and address for the record, please?

A. Godfrey M. Lebhar, office address 2 Park Avenue, New York.

Q. Are you affiliated with an organization known as Business Guides, Inc.?

A. Yes, sir.

Q. What is your position with that organization?

A. I think I am chairman of the board.

Q. What is the business of Business Guides, Inc.?

A. Publishers of business directories.

Q. Do these directories purport to be a census?

A. What do you mean by a "census"?

Q. An actual count of business firms.

A. That is not the purpose of them, but that is in effect what it is.

Q. What is the purpose?

A. The purpose of it is to provide the names and addresses and other details of the names included in the directory.

Q. How do you ascertain the names to include in—

A. Oh, we have many ways.

Q. Would you name those ways, please?

A. Yes. We have—you see, this business guide is a sub-[fol. 4] sidiary of Lebhar-Friedman Publications, of which I am also the chairman, which publishes a trade magazine, Chain Store Age. So, Business Guides has access not only to such data as our publications compile, but also the services of our field staff of subscription solicitors who travel the whole country the whole year round on a full time basis getting subscriptions for our magazines. That is one source of information. We will call that the field force.

Q. What other sources do you have?

A. We have trade publications, newspapers—

Q. What trade publications?

A. Grocery trade publications, as far as this particular field is concerned.

Q. Could you name the trade publications?

A. Why, there are so many I couldn't begin to name them all by names. All the leading trade publications. Super-market News, Progressive Grocer, local retail grocery papers, so far as the grocery field is concerned. I am confining my answers largely to the grocery field now because

we are interested in the grocery field, department store field and other fields too.

We have access in many cases to the membership lists of what are known as voluntary chains or cooperative [fol. 5] groups from which we can cull the names of chains.

After all our directories aren't interested only in—

Q. How many cooperative groups are there in the U. S.?

A. Oh, I would imagine—I am guessing now because I haven't made any real count of this recently. When you speak about cooperatives are you separating them from voluntary? There are two separate kinds.

Q. First voluntary cooperatives.

A. Well, I would say in the area of at least a thousand.

Q. How many of these do you have access to their records?

A. I couldn't tell you offhand. I don't personally compile these records, you understand.

Q. You don't personally compile these statistics?

A. No, we have a staff of 20 or 30 people, a full time staff doing this work.

Q. What is your relationship to the staff?

A. I am the chairman of the board of the company. I am the editor-in-chief of the publications.

Q. Do you have any statistical training?

A. No.

Q. Did you have any experience in statistical gathering [fol. 6] or statistical work before coming to this—

A. Only self-taught, I would say. After all, I have been publishing Chain Store Age since 1925, 38 years, in the course of which we have had to publish a numerous selection of data in our publication. I am not speaking about directories, so I have constantly had the responsibility of supervising the work of those who actually do the compiling.

Q. You mean the writers and the reporters?

A. Writers, reporters, our research department. We have a research department.

Q. When did you organize your research department?

A. Well, it may not have been called a department. We always had somebody here that was competent to do research work.

Q. Do you have a research department?

A. Yes.

Q. When did you organize the research department?

A. Probably four or five years ago we called it a department—no, it is longer than that. We have had it for about 11 or 12 years. The head of it has just retired and left us. I know he was with us 10 or 11 years so we have had it at least as long as we have had him.

Q. Does he have a pretty free hand in conducting the [fol. 7] research of his department?

A. Fairly free hand, yes.

Q. You leave it up to his judgment as to what to do?

A. Yes. He was a man of great background, graduate from the school of—Harvard School of Business, Yale University. That was his field.

Q. Rather than your field, it was his field?

A. I am talking about his particular job. I don't do the job of everybody in this organization, naturally.

Q. Business Guides publish directories. Do they publish directories for chain stores?

A. Yes, that is all they publish.

Q. Just for chain stores? When did the Business Guides first start publishing a directory of supermarket and grocery chains?

A. Well, the business was started by an individual before it became affiliated with us, and his experience goes back I believe to 1936.

Q. When did it become affiliated with you?

A. Oh, about 17 or 18 years ago.

Q. Referring to the Los Angeles metropolitan area, how large a field force do you have out there?

A. We only have one circulation man.

Q. One circulation man?

[fol. 8] A. Who covers the area.

Q. What area does he cover?

A. California.

Q. The whole state of California?

A. Yes.

Q. What are his duties?

A. To solicit subscriptions.

Q. To your magazine?

A. Yes.

Q. Does anyone subscribe to your magazine other than a grocery chain?

A. Oh, yes. I mean if an independent wanted to subscribe—we don't solicit the subscriptions from other than grocery chains but we don't deny anybody that wants to buy it.

Q. Do suppliers also—

A. Certainly.

Q. How many subscriptions do you have in the State of California?

A. Oh, I couldn't break it down that way, although our ABC Report which gives a complete breakdown of our circulation would give the exact data. If you want it I can get it from our circulation department.

Q. What would the ABC report show?

[fol. 9] A. It would show the number of subscribers to each of our various editions. You know we publish Chain Store Age in various editions. One for grocery store chains, variety store chains, drug store chains, restaurant chains and so forth. It would show the total circulation for each of those editions, specifically now the supermarket and grocery edition. It would give you a breakdown by states of the number of subscribers in each state, it would give a breakdown of classifications of what businesses they are in, whether they are store managers, store executives, independents, voluntary chains, manufacturers, miscellaneous, and so forth.

Q. When you set up the directory of supermarket and grocery chains for a given year, what specific data do you put into the directory?

A. Well, this is a continuous operation. For instance, we have just got off the press our 1963 directory of supermarket chains. Right now we are starting to compile the material, day by day, from all the sources from which we get such material, to be used when we go to press at the end of this year. This is to cover current changes that come to our attention from any source, to verify the material we had in the last edition, and then long before we get ready to go to press we send questionnaires to every chain listed [fol. 10] in the directory with a clip out of the material we published in the last edition, ask them to make any changes or corrections or additions.

That would go to the big chains with the list of all their buyers and so forth and even to the fellow of two or three store chains.

Q. Do you ask them to return those lists to you with the questions?

A. Yes, it is a questionnaire they fill out. We ask them for the locations of each of their stores.

Q. Do they return the questionnaires if there is no change?

A. Well, I wouldn't say they all do, no.

Q. How many questionnaires did you send to the Los Angeles metropolitan area last year?

A. Well, that I can't answer of my own knowledge because I didn't take care of that.

Q. You don't know that?

A. No.

Q. You wouldn't know then what percentage of response you got from those questionnaires?

A. Well, no, I don't know. To answer specifically I don't know what percentage. I think it is a very great percentage, but in the case of those who do not respond we then use [fol. 11] the telephone, we keep after them until we get whatever information is available. We don't rely exclusively on the questionnaire, of which I believe there are two or three mailings at intervals before the final date.

After we get no reply from a company, and I understand we never fail to get a reply from all fair-size companies, like Safeway or Alpha Beta or anything like that, they give us complete information to go in our directories.

Are you familiar with our directories?

Q. No. Do you have a directory? Maybe we can look at them.

A. Yes. This is the 1962 directory which forms the basis for the data in my statement. You see it is arranged geographically.

Q. You publish the Chain Store Age and Chain Store Directory, grocery chain store. Do you also publish a drug store chain directory?

A. Yes.

Q. What other types of directories do you publish?

A. We publish a department store directory, restaurant directory, variety store directory, a directory of coopera-

tive and voluntary chains, a directory of discount store houses.

Q. How do you determine what constitutes a grocery [fol. 12] chain?

A. Of course, we have no other than the ordinary understanding, census understanding. A store with more than 50 per cent of its gross—of its sales are in groceries or predominantly groceries.

Q. Do you ask these people what—

A. No, I don't know whether we ask them that so specifically, but we don't have to ask Safeway whether they were a grocery firm, do we?

Q. No—

A. These things are common knowledge.

Q. I was thinking of Louis Stores, Inc., Bay Shore Station, Oakland.

A. Well, we have the basis of our original report. It comes from a field man. He will say, "A grocery store has been opened at such and such an address by so and so and he has a second store which is opening next week."

From that basis we conclude he is a chain.

Q. If he acquires a second store?

A. Yes, I say if he opens or acquires another store. We wouldn't put him in until he has two stores.

Q. How would you determine whether he is a grocery store or a butcher shop, for example?

A. If it were a butcher shop we wouldn't put it in. It all [fol. 13] depends upon the source from which we get it. If it is by visit, on actual visit, we rely upon our own salesmen who knows what kind of a store he is in. If it is a newspaper clipping—incidentally, I didn't mention among our sources we have a very big newspaper clipping service, and if a newspaper clipping from a local newspaper says that, "John Jones opened his third grocery store at such and such a place," we do take that—we don't take it for granted because we then send a questionnaire to the address.

We don't pick up these things by hearsay. We write to the company direct, to the individual direct. I assume that if he didn't have a grocery store why he would say, "I am in the drug store business," or whatever business he is in. There is nothing mysterious about that.

Q. What percentage of responses do you get on these questionnaires that you mail?

A. I think a great percentage.

Q. Do you know?

A. I don't know.

Q. Does anybody here know?

A. Yes, I imagine so. The man that supervises the preparation of the mailing, Mr. Torpy, the head of the research department of the Business Guides.

Q. You don't know?

[fol. 14] A. No.

Q. What newspapers do you clip in the Los Angeles metropolitan area?

A. All of the newspapers. We don't clip them ourselves. We subscribe to clipping service bureaus who clip local newspapers all over the country for us. Several clipping services.

Q. What services are they?

A. Well, I haven't had much contact with them myself, but—I mean in recent years, but I think Luce is one of them. That is one of the big ones. I don't know who the others are.

Q. You say that one of your sources of information are the cooperatives. What cooperatives do you get information from in the Los Angeles metropolitan area?

A. Oh, I think—I know we have got it from Certified.

Q. What kind of information would you get from Certified?

A. A list of their members.

Q. A membership list?

A. Yes, and also Spartan's which is a subsidiary.

Q. What information do you get on that membership list?

A. Only the—all that we are interested in is whether the [fol. 15] same man has more than one store.

Q. That appears from the information—

A. The membership. His name appears. It will give us the name of the man, John Jones, and if we have John Jones in two different addresses, why we use that as the basis for sending a questionnaire to him. Don't forget, the information we get is not picked up and used just as we get it. We use that as the basis for further inquiry. We keep a card index of every name that is in that directory and all of the other directories. We have a case history of every

one of those companies from the time they first appeared, came to our notice.

Q. You say you have a field force of one man in California?

A. I said our field subscription man, yes.

Q. What is his name?

A. Offhand I couldn't tell you.

Q. Where is he located?

A. He probably works from Los Angeles.

Q. Do you know him?

A. I can find out. I don't know offhand. We have a staff of so many people I don't remember the names of them.

Q. Do you have a subscription man in Oregon?

A. I don't know. It could be a man from San Francisco [fol. 16] could cover that.

Q. Do you have a man in San Francisco?

A. I don't know. I will have to check those things. We only have 12 altogether covering the country.

Q. The same man covers the whole State of California?

A. Yes, and possibly the other western states. I mean the Pacific coast states.

Q. He might be located in San Francisco rather than Los Angeles?

A. I think—it might be, yes.

Q. Might he also cover states like Arizona, New Mexico and Nevada?

A. Yes.

Q. Would it be correct to say that your directory, insofar as it relates to the Los Angeles metropolitan area, is based upon information which you get from this one subscription man, from the newspaper clipping service and from the membership lists of Certified and Spartan?

A. No, it wouldn't, because that wouldn't include the newspaper clipping services—

Q. I mentioned the newspaper clipping services.

A. Did you include trade papers?

Q. No, I didn't. We haven't talked about trade papers [fol. 17] A. I mentioned before, Supermarket News.

Q. What do you get from trade papers?

A. The opening of new stores.

Q. The opening of new stores by the major chains. If John Jones acquires a small grocery store in an adjacent

neighborhood, it is likely it would not be noted in the Super-market News?

A. If it isn't noted we wouldn't get it. We only get what is noted, and that applies to trade papers, newspapers or any other source. What appears in these books is what we do get. I can't tell you what we don't get.

Mr. Vaughn: You also didn't mention the questionnaires which he has testified to.

The Witness: That is to verify the leads. Let's call all this stuff what we have talked about as providing leads for entries in our books. We follow them up in various ways by questionnaires, and so forth. Once they appeared in our book in one edition we don't let them get away very easily without finding out whether they should appear in the next edition. The first step, as I said, is to send a questionnaire two or three months before.

That is followed up, I believe, in reasonable time, maybe six weeks later, by a second questionnaire.

[fol. 18] If that fails to bring in the response on way or the other we use in important cases long distance telephone. We have to in the case of California.

Q. If you don't get a lead you can't send a questionnaire?

A. That is right.

Q. The leads come from the field force, from the trade publications, from the newspaper clipping service and from Certified and Spartan?

A. Well, there may be other—I am quite sure there are other voluntary chains and cooperatives operating in that area.

Q. Which ones?

A. I don't know them but I say there are others operating in California and Los Angeles.

Q. You don't know whether they make their records available to you or not?

A. I don't know, no.

Q. Have you ever made a tabulation of the number of chains in the Los Angeles metropolitan area based upon your statistics or your directories for anyone other than the defendants in this case?

A. No.

Q. This is the first time you have done this?

[fol. 19] A. Yes. That is right.

Q. Have you ever made a tabulation in terms of the total number of stores or chains in the United States for anyone other than the defendants in this case?

A. Yes.

Q. For whom have you done this?

A. Well, we have done it. We haven't done it for anybody else. I made a study of the national situation to publish in Chain Store Age, and it appeared in January 1962. That was the basis for the request which came from Von's for us to make a specific study covering the Los Angeles area. If we could make a similar study as the one we published in January 1962, they thought it would be useful to them in this case.

Q. What years were covered by the Chain Store Age article?

A. 1952 to 1961.

Q. For every year?

A. No, just the terminal years. We took the 1953 directory and analyzed it and broke it down and compared it with the 1961 directory for Los Angeles, which first came later on, the study was made later.

We were able to use 1953 as the starting point but in that case we took all the intervening years too. We made [fol. 20] a study of each directory from 1953 to 1962 inclusive. That is a ten year span, so each—the directory for each of those years for the Los Angeles and Orange Counties was analyzed and compiled into a master list.

Q. You say "for 1953." When you referred to 1953, which directory do you use?

A. I am using—those references are to directories. They would really refer to the previous year. In other words, the 1953 directory would reflect the conditions that prevailed in 1952, and so would the 1962 directory, it would relate to the data we compiled during 1961.

Q. Would it be fair to say that essentially this Table 1 in your affidavit actually reflects 1952 through 1961?

A. That is right. 1953 to 1961, that is correct.

Q. 1952 and 1961?

A. I beg your pardon.

Q. It would be 1952 and 1961?

A. That is correct. Let me correct my answer regarding

the national study. The first year was the same. The 1953 directory was it. The 1961 was different in the Los Angeles study.

Q. That Table 2 would actually reflect 1952 and 1960?

A. That's right.

[fol. 21] Mr. Vaughn: You are now referring to Table 2 in Mr. Lebhar's affidavit, are you not?

Mr. Coyle: Correct.

Q. How many subscribers did you have in the Los Angeles metropolitan area in 1962?

Mr. Vaughn: Subscribers to what?

Mr. Coyle: Grocery Chain Store Age.

A. I couldn't tell you offhand and I wouldn't guess a number. We have it in our ABC report which is the audit by the ABC Bureau, and that is correct.

Q. Is that broken down by Los Angeles metropolitan area?

A. Oh, no. I though you were referring to California.

Q. Do you have a record broken down by the Los Angeles metropolitan area that would show your total number of subscribers in the area?

A. It could be that our circulation department arranges its addresses by cities. I think it probably does, but that would have to be obtained. I wouldn't have that.

Q. Does it ever happen that you will get a new subscriber and find that he has been a chain for ten years?

A. Well, I suppose it could happen. I don't know that it ever has.

Q. That would be a new lead? Would it ever happen [fol. 22] that he had been a chain for two or three years?

Mr. Vaughn: I object to your question as speculative.

A. No.

Q. Do you know whether you ever get subscriptions from people who have been chains for a number of years?

A. Put it the other way and I think you have the answer. We don't have a subscription today from many a chain that is in existence. I wouldn't say "many," so naturally when we do get the subscription for the first time we are getting a subscription—we are talking about a magazine now—

from a chain which had been in existence for a number of years before we got it.

Q. You also get new leads when you get these new subscriptions?

A. That is true.

Q. Have you ever revised any of your directories to show these chains which were actually in existence but you didn't have a lead on them?

A. They were probably in the directory long before we got the subscription. We use the directory information for the basis of getting subscriptions.

Q. Do you get subscriptions from chains that weren't in your directory and had been in existence?

[fol. 23] A. It could happen, but I don't know.

Q. You don't know whether or not you do?

A. I don't know whether or not we ever got a subscription from a chain which had been in existence for some time whose name did not appear in our directory. I don't know that that ever occurred.

Q. You don't know one way or another?

A. No, I don't know that it did or it didn't.

Q. Do you know what percentage of all the chains in the Los Angeles metropolitan area appear in your directory?

A. Well, we hope that they all do. When you are talking about chains you are talking about two or more stores, aren't you.

Q. Yes. But you never made a door to door canvass or area canvass to determine what percentage of coverage you had in your directories?

Mr. Vaughn: I will object to the question as assuming a fact not in evidence, namely that not all of them are in the directory.

Mr. Coyle: I will rephrase the question.

Q. Have you ever made a door to door canvass or census in the Los Angeles metropolitan area to determine whether you have all of the chains in the area in your directory?

A. No, we haven't.

[fol. 24] Q. In this study that you made for the defendant Von's Grocery, I believe you said that you had made it for every year between—you have listed 1953 but that is really 1952—and 1961. I wonder if you could tell me the number

of chain stores in operation in the Los Angeles metropolitan area for each of those years starting with 1953.

A. I am afraid I will have to do some work on it. I've got the master list but we would have to add them all up. You see what we did, the first thing we did when we undertook this job was to analyze the directories for each year from 1953 to 1962, inclusive, listing from each directory the names of all chains in the area with two or three stores. They were ten separate lists. Those ten separate lists were then amalgamated to give us that master list.

Q. What were those ten separate lists?

A. Ten separate directories. The question you have just asked me was as to whether I could give you the total number of chains for each of those intervening years. Well, we didn't add them up because it wasn't required for these tables.

Q. What do these figures indicate here, "3/3"?

A. That means three stores of which three were supermarkets. The first figure is the number of stores. It wouldn't necessarily all be supermarkets. They could have [fol. 25] a small store.

Q. What do you define as a supermarket?

A. Our definition has changed through the years as the market has changed. I believe for our directory purposes we don't regard as a supermarket a store that does less than \$10,000 a week, which would be \$520,000 a year. If it's volume is less than that we would not regard that as a supermarket.

Q. Do you apply the same definition in every part of the country?

A. I think so, yes.

Q. Have you observed a trend toward larger and larger supermarkets in the United States?

A. Very definitely.

Q. Have you ever compared your count on the number of chain stores in a given area to Bureau of Census figures?

A. No, I haven't. I mean—in this connection, you mean?

Q. Yes.

A. No.

Q. Have you ever compared your count with any source material or any reference material to determine its accuracy?

A. If you are asking me in connection with this study [fol. 26] that I made, no, because the sole purpose of this study was to take the data we had, analyze it and report what it showed. That is all we did. We didn't go beyond that.

Q. It showed the total number of listings that you had based upon the leads which you got from this one man field force, from the trade publication, from the newspaper clippings and from the cooperatives?

Mr. Vaughn: I will object to the question as improperly summarizing the evidence and asking this man to trace a half hour's evidence and summarize it in one question, which you tried to do before.

Mr. Coyle: I am asking him what sources of leads he has.

Mr. Vaughn: You have asked him before. The question has been asked and answered at least twice before.

Q. Did you understand the question?

A. I'd like him to repeat it.

(The question was read.)

A. (Continuing) Not entirely from that. We have other sources.

Q. What other sources?

A. Information that comes to us from people in the trade. [fol. 27] Q. From word of mouth, you mean?

A. Yes, word of mouth. We have Dun and Bradstreet's reports, which we check. One thing I didn't mention which takes a lot of space in our organization here, we have the telephone directories from every little community throughout the United States, including not only the A. T. & T. directories, but even the independent telephone companies. Not only A. T. & T. telephone, the big companies. We go through that with a fine-tooth comb.

Q. Go through what?

A. The telephone books, to check names and addresses and telephone numbers because you will find that our directories include the telephone numbers.

Q. I am looking at page 4 of your tabulation, a notation showing that a chain of four stores called the Desert Fair first appeared in your 1956 listing.

Would you make any check in that situation to deter-

mine whether or not that chain may have been in existence prior to the first listing?

A. No, we would have no occasion to do that because, after all, the directory we had published for previous years was already in existence. We couldn't change it.

Q. If that firm had been in existence your previous years would have been understated?

[fol. 28] A. That is quite correct.

Q. Another instance. Fine's Food indicates four stores in 1956 and no previous indication of any stores, and Foodland Markets indicates four stores in 1955, no previous indications.

Mr. Vaughn: Is that part of a question?

Mr. Coyle: I am just saying that is so.

Mr. Vaughn: I would move to strike Mr. Coyle's testimony in that respect.

Q. Referring to page 6 of this work paper and calling your attention to the notation for Garvey Markets, could you tell me what that notation indicates to you?

A. That in the 1954 directory we listed Garvey Markets with five stores, including two supermarkets.

Q. Do your directories or your records indicate whether Garvey Markets was in existence as a chain prior to 1954?

A. Neither prior nor subsequently. If it is not listed in our book we have no information about it.

Q. Did your follow-up questionnaire indicate what happened to Garvey Markets?

A. That I couldn't answer about a specific case.

Q. Would it be shown on this master list if it had indicated what had happened to them?

A. No. The fact that it does not appear in a subsequent [fol. 29] edition of the directory is reflected in my comments on the disappearance of some chains that are included in this entire list of 270 companies represented in this list.

Q. You would assume that Garvey Markets is out of business?

A. We assume. We have no information, and I so state in my affidavit. We have to assume where we could get no further information from them, or in some cases, further

work sheets would show in some cases that we did receive information that they liquidated or sold their stores.

Now, it could be that in that particular case I can give you the answer. Garvey Markets. We have no information as to what became of them. Our records do not disclose.

Q. May I see this document you have just referred to?

A. This is a breakdown of all this material.

Q. You would assume in the case of Garvey Markets that Garvey Markets came into existence in 1954 and went out of existence in the same year?

A. I would not assume that at all. I would assume that in preparing our directory for 1954 we had information that Garvey Markets was operating five stores, of which two were supermarkets. Whether that information was correct or not I don't know. It came from the same way we get most of our information stuff, which is 99 $\frac{3}{4}$ correct, [fol. 30] we believe, and from then on we don't know what happened.

Q. You used the term "99 $\frac{3}{4}$ correct." You made no statistical study?

A. No, I am using that—

Q. In a layman's sense, not in a statistician's sense?

A. Only by—let's put it this way. We assume that our lists are correct to a very great percentage otherwise we wouldn't sell \$500,000 worth of these directories every year.

Q. Your total sales are \$500,000 a year?

A. Yes, for the directories.

Q. Does that include your drug store directories?

A. Other drug store directories too, department stores, all of them.

Q. How much do the directories cost?

A. I think this grocery one—they vary in price. You will find it in the front of the book. It is \$40. The department store one would be \$50. It depends really upon their thickness, but I think we publish no directory that costs less than \$25. That is for the nation. We also publish directories taken from the national for individual states, and they may sell for \$2 or \$3 or \$12.

Q. They all go into this \$500,000 total?

A. That's right.

[fol. 31] Q. How many grocery directories do you sell in a year?

A. Well, I'd have to hazard a guess. We have the actual number, of course, but I would say probably 3,000.

Q. 3,000 directories?

A. Yes.

Q. In the whole United States?

A. Yes.

Q. How many directories would you say in the Los Angeles metropolitan area?

A. I don't know. We don't sell them to chains, don't forget. We sell them to suppliers. The directories are not sold to chains. The chains themselves are not interested in having a directory of chains. We sell them only to manufacturers and suppliers.

Q. When you referred to the 3,000 that you might sell in the grocery trade, was that including these various state directories?

A. Yes, that is an innovation of only the last two or three years and I don't think those individual state sales amount to more than a few thousand dollars a year.

Q. Could you get for us a count of your total subscription list in the Los Angeles metropolitan area?

A. You are speaking of Chain Store Age now.

Q. For Grocery Chain Store Age.

[fol. 32] A. Yes.

Q. I would like that for every year covered by your study so we will see the movement. The first year and the last year.

Mr. Vaughn: You want the number of subscriptions he has to Chain Store Age?

Mr. Coyle: Yes, by grocery chains.

The Witness: I couldn't get it for Los Angeles. Again I was thinking of states because the ABC statement is broken down by states.

Q. Let's get it for California.

A. For California, and I will see how far back we can go.

Mr. Vaughn: I don't know that I see the materiality of that.

A. I have found for 1962, the 1961 and 1960.

Q. Are those the only years you have them for?

A. Well, we have them but I thought after you see what

it is it may not be useful to you at all. I don't know. I see in California we had 3941 subscriptions in the year ending 1962. For the year 1961, California subscriptions amounted to 4080. That one will indicate what it was for 1960.

Q. For the record, would you state what it was for 1960? [fol. 33] A. Yes, 3967.

Q. Referring to this document which you have identified as an ABC report which is marked "For the six months ending December 31, 1960," could you again tell us how many subscribers to your grocery edition of Chain Store Age you had in State of California?

Mr. Vaughn: To which I will object on the grounds of irrelevancy. It doesn't seem to me that subscriptions to Chain Store Age have any relevance to this question at all.

Mr. Coyle: I think it will prove to be relevant.

A. The number of paid subscribers we had in California for the November 1960 issue was 3967. You will note a comment here that this is not an average of the circulation for six months, because, naturally, it does vary, and the notation further says that "Total paid circulation of this issue was .10 per cent less than the average total paid circulation for the period."

Q. Referring to the ABC report for the six months ending December 31, 1961, could you tell us what your paid circulation was?

Mr. Vaughn: Same objection.

A. I would like to state first for clarification that ABC [fol. 34] stands for Audit Bureau of Circulations, which is a national organization supported by national advertisers, advertising agencies and publications for the purpose of taking an audit of the circulation of publications which bases their advertising rates on their claimed circulation.

This is an outside auditing organization for which those publications who are willing to submit to it have to pay a very substantial fee to send in their auditors once a year or twice a year and make a complete audit of all the subscriptions we claim to have, how many are in arrears and how many are truthfully paid. Answering your question, I would say that the circulation, the paid circulation of the

November 1961 issue of the grocery edition of Chain Store Age in California was 4080.

That, according to the notation of the audit was .28 per cent less than the average total circulation for the six months period.

Q. Now I wonder if I could trouble you to get the ABC reports for 1953 and 1954?

A. I'll see if I can get them. I don't know whether he has got those back that far. He probably has his original working papers if he doesn't have the blue sheets. ABC has nothing to do with the sales of our directories so we don't have any such records of that at all. All we would [fol. 35] have would be total sales of directories for each year as a business report, but we certainly wouldn't have it broken down by Los Angeles and it would have no relevance because they are sold to suppliers.

Q. Your leads come from your subscription lists?

A. No, only partially.

Q. I know.

A. Partially.

Q. It does come partially from your subscription list?

A. Partially.

Mr. Vaughn: When you say "subscription list," you are meaning subscription list to the magazine Chain Store Age?

Mr. Coyle: I want to ask the witness that question.

Q. The leads that come from your subscription list, what subscription list do they come from?

A. Chain Store Age Grocery list.

Q. That is where your leads come from?

A. Yes. In other words, our directory division has access to all the data that the publications compile, which would include new subscriptions. In other words, it is one organization and all the data that one compiles is available to the other.

[fol. 36] Q. Then I do want what I originally said, your subscription, your total number of paid subscriptions in the years 1952 and 1953, if you could get them for us.

Mr. Vaughn: I don't think you have to do that, Mr. Lebar. I don't see the materiality of it and if you know from your own knowledge whether they were greater or less or what they were, you can answer the question.

Mr. Coyle: Let him get it. It will only take him a minute to get it. We are here—

Mr. Vaughn: No.

Mr. Coyle: The witness has testified that this is one of his sources of leads, and I just wanted to see how big a source of leads it was in 1952.

Mr. Vaughn: Maybe you can—

A. I could hazard a guess that it probably isn't five per cent source of our leads.

Q. It is not five per cent of the source of your leads?

A. Less than five per cent. I would hazard that guess. It is a very minor source of leads. After all we don't get so many new subscriptions in the course of a year.

Q. How much of your subscriptions go up during the period 1952 and 1962 in the Los Angeles area?

A. That I wouldn't say offhand.

[fol. 37] Q. They have been increasing?

A. Oh, yes. Whether in this particular state or not, I don't know, but I would say our total circulation has increased every year since we have been in business.

Q. There is no reason to suppose that it hasn't been increased in California?

A. I would be pretty sure it has.

Q. And in the Los Angeles area?

A. Yes. Except, in one particular—let me qualify that. You see, we publish our grocery edition in two editions; one for store managers and one for executives.

One we call the Executive Edition and the other the Store Manager Edition. Through the period of years we have been discussing, the number of chain stores has declined and therefore the number of copies going to store managers would tend to decline over that period.

Q. The number of chain stores has declined?

A. Certainly.

Q. In the Los Angeles area?

A. Yes.

Q. You say in the period between 1953 and 1962 the number of chain stores in the Los Angeles area has declined?

A. Well, probably not in the last ten years. I was going [fol. 38] back. I mean with the trend toward biggers stores, the number of grocery stores has declined, and that has had some effect on the number of copies going to chain units.

Now, it could be that that trend has changed so that in 1962 compared with 1953, a particular chain might have almost as many units as it did in the previous time. In some notable cases like Safeway we know that they have fewer units in the Los Angeles area than they had in 1952.

Therefore, the number of copies of the managers' edition that goes to Safeway managers would be fewer today than it was then.

Q. Those copies that go to managers wouldn't be a lead for you anyhow because you already have Safeway?

A. No, that is why I say the leads that we get from our subscriptions are relatively unimportant.

Q. They are five per cent of your leads, you say?

A. I say I don't believe they would exceed five per cent.

Q. What per cent of your leads would you get from the trade publications?

A. Well, I am not going to attempt—that would be pure speculation. I don't know. I don't do the work myself.

[fol. 39] Q. Wasn't it speculation when you said "five per cent"?

A. I did say it was speculation. I said I would hazard a guess, and that is only a guess. It is not an accurate figure.

Q. It would be speculation for you to say where the majority of your leads come from?

A. I wouldn't want to speculate as to which was the greatest. They come from so many different sources I don't know what proportions come from each source.

Q. Referring to page 7 of your work sheet and the notation for Hughes Markets, I wonder if you would tell us what the notation shows with respect to Hughes Markets in 1955 and 1956?

A. It shows that our directory for 1955 did not include Hughes Markets but that our directory for 1956 included Hughes Markets having four stores, of which all were supermarkets.

Q. Would you assume from that notation that Hughes Markets was not a chain prior to 1956?

A. That would be guessing. I don't know the history of it. I know that Hughes came out of Fitzsimmons I think originally, and it could be that he started opening four stores fairly rapidly. He was an experienced chain store man.

[fol. 40] Q. That is what your study would—

A. If you are asking me, I don't know. I am assuming how I would account for the fact that Hughes was operating four stores in 1956 and our directory showed him operating none in 1955. At least we didn't include him. He might have been operating four for the last 20 years. It could be that we missed him entirely, but I know that wasn't the fact because I happen to know the man and I know he was with Fitzsimmons' chain. I think I am right on that. Then he started in business for himself.

Q. Your records wouldn't show the precise year when he opened as a chain?

A. I think it would. I think our card index on this market, the case history that I tell you we obtain on each one of these companies would give us the whole story.

Q. The case history that you used to prepare that sheet showed that Hughes Markets wasn't operating as a chain in 1955, and that is the type of case histories that you based your study on, is it not?

A. I don't get the import of your question.

Q. Is the case history that you used to prepare this table as it relates to Hughes typical of the case histories that you have used to prepare—

A. That I don't know. I haven't got the case history in [fol. 41] front of me so I don't know whether it is typical.

Q. Is this the case history?

A. No. When I refer to the case history I am referring to the card index we maintain of each one of these companies. Now, that card may disclose when Mr. Hughes opened his first store. He may have opened it in 1954. He may have opened it in 1953. I doubt it but he may have. It will tell the story as we have it to justify why we have him listed in 1956 as operating four stores.

That is what our case history would disclose.

Q. But if he were operating two or more stores prior to 1956 your study would be in error as to that situation, would it not?

A. If it didn't include that it would be in error. That is two assumptions. Number one, that he was operating two or more before that and number two, that we didn't include it.

Q. You haven't included it?

A. We haven't included it.

Q. That is definite, you didn't include him before—

A. That is right, yes.

Q. Referring to page 5 of your work sheet, could you tell us what page 5 shows as to Fine's Food and Foodland Markets?

[fol. 42] A. Referring to Fine's Food our directory for 1956 listed it as a chain with four stores of which two were supermarkets, then located in Sun Valley but later in Los Angeles.

Q. With respect to Foodland Markets?

A. The reference to Foodland Markets indicates that our directory for 1955 listed it as a chain operating four stores of which four were supermarkets.

Q. With respect to both of these listings—

A. They were the earliest entries.

Q. They were the earliest entries—

A. In our directories.

Q. You don't know whether they were operating as chains prior to that time?

A. No. I don't.

Q. Referring to page 6 of your work paper, could you tell us what your work paper shows for the Great A & P?

A. Great A & P shows—let me say did show when the paper was prepared no information whatever but later a notation was put on it to indicate that in 1953 A & P was operating 17 stores in the Los Angeles area, of which 17 were supermarkets, and in 1962 they were operating 21, of which 21 were supermarkets.

Q. Would that—

[fol. 43] A. That is in addition to the work sheet that was not taken from the directories.

Q. Would that indicate that your directories have not shown A & P in the Los Angeles metropolitan area?

A. I might not have given the number of stores. That is what I am talking about. It might have listed A & P.

Q. Do you know whether it did or didn't?

A. Well, look at 1962 and you will see. Directory for 1962 lists A & P as operating 29 stores in eight California counties. It does not specifically say how many were in Los Angeles and Orange Counties, so this information was

obtained from some other source. It was not in the directory.

Q. Do you know what source that information was obtained from?

A. That I can't tell you at this time.

Q. Who made this work sheet up?

A. Mr. Torpy, Joseph Torpy.

Q. Is your affidavit based upon this work sheet?

A. Yes.

Q. You didn't make the work sheet up?

A. No.

Q. Who is Torpy?

A. Joseph Torpy is the head of the research department [fol. 44] of the directory division.

Q. He would know where that material came from but you don't know where it came from?

A. No, this is my notation, not his. The work sheet, the photostat as you see it, all the markets on it were put on by me, not by Torpy.

Q. Did you supervise the preparation of this work sheet?

A. No. Indirectly; he is the head of the research department and I asked him to make the analysis, which he did, and we checked the names of the individual cities to see whether they were in the two counties involved.

Q. You have never done anything like this before?

A. Yes, we did do it in the 1962 for this article on the national picture.

Q. But not for a local area?

A. No.

Q. Referring to page 8 of the work sheet, could you tell us what page 8 shows with respect to Kory's Markets?

A. It shows that our directory of 1955 showed that this company was operating five stores in Los Angeles at that time, of which five were supermarkets.

Q. Does it indicate that Kory's was not operating as a chain prior to that time?

A. It does not indicate that it was not operating as a [fol. 45] chain but it indicates that our directories prior to 1955 did not include it.

Q. It was not reflected as a chain prior to 1955 when you—

A. Not in these directories.

Q. Or in your affidavit?

A. No. My affidavit is based entirely upon what appears in this master list.

Q. Your affidavit would show Kory's Markets as a new entry with five stores in 1955, would it not?

A. New entry in our directory, yes.

Q. You would reflect it as a new entry into the market in your affidavit?

A. No, I would not—you mean talking about in breaking down the list?

Q. Yes.

A. Yes, certainly.

Q. Referring to page 10 of your work sheet, can you tell us what the work sheet shows with respect to Pix Markets?

A. It showed that our directory of 1960 listed them as operating 13 stores in the area.

Q. Did it show Pix prior to 1960?

A. No.

[fol. 46] Q. Would Pix be reflected in the table that you incorporated in your affidavit as a new entrant with 13 stores in 1960?

A. Yes, new entry in our directories and my comments are based entirely upon what our directories show.

Q. Based upon your experience, is it somewhat unusual for a chain to spring up with 13 stores?

A. Well, it has been unusual in the past, but with the bantam type of operation coming into the picture in recent years it wouldn't be unusual at all to see a company open 10 or 15 right off the bat. There it involves a small investment.

Q. Referring to page 11 of your work sheet, can you tell us what the notation is for the S & K Markets?

A. That in 1955 our directory for that year listed them as operating two stores, both supermarkets, and that—that is all the work sheet itself lists, but I have a notation on that that they were later sold to Pix.

Q. In what year were they sold to Pix?

A. I don't know.

Q. Did you make the notation?

A. Yes, I made this notation. But, that probably came from our data we have in the office. In other words, we went through every one of these names to find out what

[fol. 47] became of them, and if our case history that we have on S & K Markets disclosed that they were sold to Pix, presumably it was in the first year in which they didn't appear in our directory as a separate entity.

Q. Would it be in the first year they didn't appear or in the last year they appeared?

A. It would probably be in the first year. After all if they were sold to another company there wouldn't be a hiatus. I assume that they were sold the year following their appearance as a separate entity in our directory.

Q. Referring to page 13 of your work sheet can you tell us what that page shows with respect to Tops Markets and U-Tel-Em Markets?

A. It shows with reference to Tops Markets that our directory for 1954 indicated that they were operating four stores, of which four were supermarkets, and the entry for 1956 shows that they were operating two stores of which two were supermarkets and that thereafter they did not appear in our directories.

Q. What was the first entry shown for Tops?

A. 1954. It showed four stores.

Q. Do your records indicate that they made a new entry in 1954?

A. My records—

[fol. 48] Q. Do they show that they were not operating as a chain prior to 1954?

A. It shows that this was the first time that we discovered them. What was the other one, U-Tel-Em?

Q. U-Tel-Em.

A. Our directory for 1954 listed them as operating six stores, of which six were supermarkets, and they appeared in each directory for each of the successive years until 1957, inclusive.

In the last year they were indicated as operating ten stores and a notation, not the work sheet but a notation shows that in 1957, in February 1957 they were sold to Mayfair.

Q. Your work sheet indicates also, does it not, that U-Tel-Em was not operating as a chain in 1953?

A. 1953, correct.

Q. Referring to your affidavit, to page 6, you state I believe that in the period covered by your affidavit, that is in

the period between 1952 and 1961, that two firms with ten or more stores merged with other concerns. Is that correct?

A. What paragraph are you referring to?

Q. The top paragraph.

A. Yes.

[fol. 49] Q. Referring to page 3 of your work sheet and calling your attention to Clark's Markets, can you tell us what it shows as to the termination of Clark's Markets?

A. The work sheets show nothing but the notation on it added subsequently indicates that in 1958 Clark's Markets were sold to Food Giant.

Q. Was Clark's Market a chain of ten or more stores?

A. Yes.

Q. Referring to page 7 of your work sheet, can you tell us what the work sheet shows as to the termination of the Iowa Pork Shops?

A. The work sheet itself showed that the last entry for Iowa Pork Shops was in the 1958 directory, at which time they were operating 11 stores. The notation on the work sheet shows that thereafter they were sold to Fox, and therefore did not appear in subsequent directories.

Q. That was a chain of ten or more stores also?

A. Obviously.

Q. Referring to page 11 of your work sheet can you tell us what it shows as to the termination of the Raisin Markets?

A. The work sheet itself showed that our directory for 1958 showed that that company was operating 13 stores, that thereafter it was sold to Alpha Beta—the work sheet [fol. 50] doesn't show that but the notation on it shows that. It was thereafter sold to Alpha Beta.

Q. Could you tell us what your work sheet shows on page 11 as to the termination of the Shopping Bag Store?

A. It shows that as of our 1960 directory they were operating 37 stores and the notation on the work sheet shows that thereafter they were merged with Von's.

Q. And they were a chain of more than ten stores?

A. Yes.

Q. I think you testified that the work sheet shows that the U-Tel-Em Markets were a chain of ten or more stores sold to Mayfair?

A. I don't know whether I testified to that but that is true.

Q. To recapitulate, your affidavit says that two concerns with two or more stores merged with other chains in the period?

A. I can't take that out of context.

Q. I want to know what it means.

A. You have to read the whole thing. I will have to read it all to tell you what it means. The reference to two chains merging with other concerns on page 6 of my affidavit does not imply or state or mean to state that only two chains merged with other concerns. The two chains that are referred to in that statement were Jim Dandy Markets of Los Angeles, which were sold to Lucky in 1956 and Shopping Bag—they had ten stores at that time. They operated ten stores in 1953, and Shopping Bag of Los Angeles which operated 25 in 1953 and merged with Von's.

That is the reference to the two chains of the 25 which are listed as operating—of the 24 operating ten or more stores in 1962.

Q. Referring to page 7 of your work sheet, would you tell us what page 7 shows with respect to Jim Dandy?

A. It shows that in 1956 they were operating nine stores and that thereafter they became Lucky. They were merged with Lucky, presumably.

Q. How do you show these other stores in your tables here, the stores such as Clark's, Iowa Pork Shops and U-Tel-Em?

A. Let's see. Let's take one at a time and see what classification they are in, because that will tell me what table to look for.

Q. Take Iowa Pork Shops.

A. That is included as a chain which operated six stores in 1953 and were sold to Fox in 1958.

Q. Wasn't that a chain with ten or more stores?

A. No, not in 1953. This particular section is accounting [fol. 52] for what happened to the chains that were in existence in 1953, and that is all it says.

Q. How many chains of ten or more stores were in existence in 1953?

A. In 1953 we had eight that were in existence in 1953 and in 1962, in both years. We had two that were in exist-

ence in 1953 but were not in existence in 1962, and in 1962 we had seven that were not in existence in 1953.

Q. Referring to page 5, the bottom of page 5 and the top of page 6 of your affidavit, you don't purport to show there the chains which entered what you call group 3 subsequent to 1953 and were acquired or otherwise left the grouping prior to 1962?

A. That is true. The statement covers just what it says it does. It covers only the chains with ten to 99 stores, the number of them that were in existence in 1953 and the number that were in existence in 1962, jumping from nine to 23, and accounts for who they were and how they came about, and it explains in detail how we arrived at 23 chains in 1962 in this category where there were only nine in that category in the 1953 directory.

That is all it purports to show. It doesn't cover anything more or anything less.

Q. I do not want to argue with you. It seems that in [fol. 53] some of these other discussions of group 2 and group 1 I think you do indicate which are the chains that entered the group and subsequently left?

A. Well, that may be another observation. These are observations. It could be somebody else studying this data could arrive at a lot more conclusions but these are the conclusions that I arrived at and I thought were pertinent.

Q. Referring to table 1, page 3 of your affidavit, does it show that there were 704 chains, according to your records and your figures, 704 chains in 1952, which you show for 1953, and that of those 704, 300 were chains of nine or fewer stores?

Mr. Vaughn: It doesn't show that.

A. No.

Mr. Vaughn: It shows 704 chain stores, not chains.

Q. A chain from two to nine stores would represent 42.6 per cent of all chain stores?

A. If that is the correct percentage. It is 300 out of a total of 704 in the year 1952 as represented by our 1953 directory.

Q. Then in the year 1962 chains of two to nine stores had

increased to 346 or 31.8 per cent of the total number of [fol. 54] stores operated by chains in the area?

Mr. Vaughn: I object to the question as argumentative.

Mr. Coyle: I am asking him if it is true.

Mr. Vaughn: I know you are asking him if it is true but you are asking him to perform a mathematical act here which he has not so far as I know heretofore performed.

Mr. Coyle: Would you mark this as an exhibit, please?

(Sheet entitled "Table 3" marked Lebhar Exhibit 1 for identification, as of this date.)

Q. I show you Lebhar Exhibit 1 and ask you whether this exhibit shows the total number of chains of two to nine stores and chains of ten or more stores shown on your table 1 in your affidavit.

Mr. Vaughn: You are now asking him about the figures in the line under "Number of stores," not the percentage?

Mr. Coyle: That is correct.

Mr. Vaughn: Does that conform with table 1 in the affidavit?

Mr. Coyle: Yes.

A. Correct.

[fol. 55] Q. If those percentages are mathematically correct, would it indicate that chains of ten or more stores accounted for a larger percentage of all stores operated by chains in the Los Angeles metropolitan area in 1961 than in 1952?

A. It would, with this qualification. That you will notice in the table that the chains with four to nine stores declined from 30 in 1953 to 22 in 1962, and the reason for that decline which is explained in the affidavit, I believe, was because many of them were promoted to group 3 by expansion, so with fewer chains in the smaller group you had more chains in the larger group and therefore the number of stores in—the increase of number of stores is accounted for in that way. The mathematics are there.

(Sheet entitled "Table 4" marked Lebhar Exhibit 2 for identification, as of this date.)

Q. Mr. Lebhar, have you ever undertaken to make a tabulation or a count of the total number of stores in the Los Angeles metropolitan area, whether they be chains or independents?

A. No, I haven't.

Q. You, from your own knowledge, don't know what the total number of chains——

A. No, I don't.

[fol. 56] Q. Referring to Lebhar Exhibit 2 for identification and also referring to Table 1 of your affidavit, does table 1 indicate that in 1953 there were 40 chains in the Los Angeles metropolitan area with four or more stores and that those 40 chains operated a total of 574 stores?

A. Yes, it does.

Q. Is this reflected in Lebhar Exhibit 2 for identification under the column "40 chains with the most stores"?

A. Correct.

Q. Referring again to table 1 of your affidavit, does this table show that in 1961, which you indicate as 1962 because of the date of the directory, 24 chains in the Los Angeles metropolitan area with ten or more stores were operating 739 chains in that area?

A. 739 stores, yes, it does.

Q. Referring to the first column of Lebhar Exhibit 2 for identification, and referring to the figures given for the total number of stores operated by all grocery stores, if the total number of stores operated by the 40 chains with four or more stores in 1952 is expressed as a percentage of all grocery stores operated in 1952, would the percentage be approximately 10 per cent?

Mr. Vaughn: You don't have to answer that, Mr. Lebhar, unless you can tell the reporter——

[fol. 57] A. Yes, I can say that that is approximately correct.

Q. Would the percentage of stores operated by the 24 chains with the most stores in 1961 be greater than the percentage shown for the 40 chains in 1953?

A. Yes, in——

Mr. Vaughn: I will object to the question. Obviously this is an argumentative exhibit and the question is therefore argumentative in that in the second column on your proposed Lebhar No. 2 you have listed all chains with four or more stores while you in the last column there have listed only chains with ten or more stores. You are comparing apples and oranges, in other words.

Mr. Coyle: We are trying to show that the 24 chains with the most stores in 1962 had a bigger percentage of all stores than the 40 chains with the most stores in 1953, and I think it is obvious from the tables submitted by the witness in his affidavit.

Mr. Vaughn: My objection still stands. Naturally he may answer the question.

A. (Continuing) The only way I can answer the question, if the figures for the total number of grocery stores operating in the area is correct, then the mathematical percentage of 739 in 1962 of the figure given is correctly [fol. 58] stated as 16 per cent, which is more than 10.3 per cent.

(Sheet entitled "Table 5" marked Lebhar Exhibit 3 for identification, as of this date.)

Q. Referring to Lebhar Exhibit 3 for identification, is the figure of 704 chains of two or more stores for the period 1953 or 1952 the figure which is derived from your affidavit?

A. Yes, sir.

Q. With respect to the figure 1085, is that a figure which was derived from—

A. That is also derived from it.

(Sheet entitled "Table 6" marked Lebhar Exhibit 4 for identification, as of this date.)

Q. Referring to Lebhar Exhibit 4 for identification, does your affidavit at page 4 show that there were 208 chains of two and three stores operating in the Los Angeles metropolitan area at some time during the period between 1952 and 1961?

A. It does. You specify two and three store chains?

Q. Yes.

A. Yes.

Q. Does it show that during that period 58 of those chains went out of business?

A. Yes.

[fol. 59] Q. Does it show that 12 of these chains were acquired?

A. Yes.

Q. Referring to Lebhar Exhibit 4, therefore, are those figures 58, 27 and 12 the figures reflected in your affidavit?

Mr. Vaughn: Isn't that argumentative? Either the answer to the question is yes or no depending upon what the affidavit says, and doesn't the affidavit speak for itself?

Mr. Coyle: It clarifies the affidavit.

A. No, I think it muddies the affidavit myself, because what I said was that the group 1 chains that we reduced to single stores were still in business and there are 27 of those, so that only 58 were out of business.

Q. I think that is what I have listed there.

A. You total these together whereas I separated them.

Q. Your affidavit does state that of the 208 chains operated at some time, during some time in the area two to three category, 97 are no longer operating as chains or are out of business, acquired or operating as single—

A. Yes, it says so in effect. It doesn't say so in so many words.

Q. Referring to the group 2 discussion in your affidavit at page 5 and to the portion of the Lebhar Exhibit 4 for [fol. 60] identification, does Lebhar 4 for identification in the column which reads "8, 1, 5 and 11" portray or describe it as happening in your discussion of group 2 on page 5?

Mr. Vaughn: May it be understood that I have a continuing objection to these questions on the ground that they are argumentative. I see one error right away.

A. Yes. I say two became single stores, not five. That is one error.

Q. Other than that two, that two are reduced to single stores rather than one—

A. Yes, I think that is correct with that one change.

Q. Referring to your affidavit, page 5, you state I think that five stores which had been in group 2 at some time during the period had dropped back into group 1 by disposing of certain of their stores prior to 1962 and then later you state that six stores or chains climbed from group 1 into group 2. Would this indicate that in the combined category of two to nine stores for the period 1953 through 1962 there were a total of 253 stores?

A. I couldn't come to that conclusion from what you just said, but I am not disputing the fact.

Q. What I have done is add the 208 to 56 and subtracted the figure 11 which is the six which climbed up and the [fol. 61] five which went back.

Mr. Vaughn: I am just not smart enough to figure out whether that is right or not right on the spot, to tell you the truth.

A. I am afraid I can't really clarify that because I would have to study these figures to answer it accurately. I assume that you have it right.

Q. Referring again to the stores which were listed in your discussion of group 2 in the four to nine store chain and were subsequently acquired, I think that the previous testimony brought out that some of those stores grew into chains of more than nine stores prior to the time they were acquired, isn't that correct?

A. Yes.

Q. Stores like U-Tel-Em?

A. Yes, I think it did, although I am not too sure whether any of those chains were in existence in 1953. Were some of them in existence or did they all come in after 1953, then get to the point where they had ten stores and they were then taken over. I am not too sure. I can probably—

Q. We have a chain like Raisin Markets. Raisin Markets is one example.

A. That was in existence in 1953, achieved a status of [fol. 62] 13 stores in 1958 and then was sold, yes. I don't know whether there are 11 of those. The 11 might have included some of those.

Q. The 11 would have included some of those?

A. Yes, it would have included those.

Q. Mr. Lebhar, in connection with your work do you ever make or prepare any estimates as to what percentage of total sales in the area are accounted for by chains?

A. No. We don't have occasion to. You are speaking about the area of Los Angeles?

Q. Yes.

A. We are not especially interested in Los Angeles. We don't even—we do it for the country at large, chain store proportion of sales for the country at large, we do that annually, but we don't do it for any specific district.

Mr. Coyle: I'd like to have this marked as Lebhar Exhibit 5 for identification. Lebhar Exhibit 5 is the work sheets which we have been referring to in the course of this.

The Witness: I referred to in my affidavit as the master list.

(Work sheets marked Lebhar Exhibit 5 for identification, as of this date.)

[fol. 63] Examination.

By Mr. Vaughn:

Q. Sir, you referred to Mr. Joseph Hughes as formerly being with Fitzsimmons. Just for the record, Fitzsimmons changed its name to Thrifty Mart, did it not?

A. It did.

Q. I would like to clarify again, if it is not already clear on the record that in your affidavit and with particular reference to the discussion heading group No. III on page 5 that what in effect you did there was to take the nine chains which were shown as operating ten or more stores in 1952, subtract from those nine the two which merged with other concerns prior to 1961 and then added to those seven chains the newcomers into group 3. Isn't that right?

A. That is correct.

Q. And it does not purport to show the chains which may have risen from group 2 to group 3 between 1952 and 1962 and prior to 1962 were acquired by other concerns?

A. That is right or disappeared for other reasons.

Q. Have you made any computation, sir, which would show what percentage of the stores opened by chains since 1953 were opened by one of the chains in group 3, that is, having ten or more stores in 1953, and what percentage were opened by chains which increased in size from group 2 to group 3 between 1952 and 1961?

[fol. 64] A. I did make some calculations, only this morning, to satisfy my own curiosity, and I found that chains with ten or more stores between 1952 and 1961 added 335 units to the 404 operated in 1952.

That figure is based, when we speak about opening stores, this is net result. They may have opened two stores and closed one, but I mean the total number of stores operated

by the chains with ten or more stores in 1952, according to our 1953 directory, had altogether 404 stores, whereas in 1961, as revealed by our 1962 directory, they had 335 more, which makes a total of 739.

Now, then, of these 335 stores which were added, 241 or approximately 75 per cent were added by group 2 chains or newcomers since 1953.

Another observation, the chains with ten or more stores increased—well, it is repeating what I said—from 404 to 739, again a gain of 83 per cent. Of these eight largest chains which were in existence both in 1962 and 1961 increased their number of stores from 369 to 465, a gain of 25 per cent.

The names of the chains involved and the figures are available on this compilation of mine.

Mr. Vaughn: I have no further questions.

[fol. 65] By Mr. Coyle:

Q. When you say "opened," you mean they show more stores? Some of them may be acquired?

A. That's right.

Q. Most of them might have been acquired?

A. That's right. It is immaterial for my particular purpose. I am talking about where the number of stores, 1085 stores shown in my table 1, where did they come from.

Q. When you refer to Safeway, is Safeway one of the eight largest chains?

A. Yes.

Q. Safeway shows a decline in total number of stores?

A. That's right, so it naturally effects the result.

Q. Is Safeway closing small stores and opening large stores?

A. I presume they are. Yes.

Q. It is common knowledge that that is what they are doing?

A. Yes, it is common knowledge. All the chains are doing that.

Q. These eight largest chains which you have shown as increasing by 25 per cent in number of stores, they would be opening the supermarkets rather than the smaller categories of stores?

[fol. 66] A. That would be true of all chains whether they have two or three or four to nine or whatever.

Q. Would it be true of Speedy Marts?

A. Well, unless they were bantam stores. But the trend towards bigger stores applies to them all.

Q. Some of these are acquiring stores. When they are acquiring stores aren't some of them acquiring smaller stores?

A. I don't understand the question.

Q. In other words, when you compare the percentage of increase in total number of stores of the eight largest chains with the other chains in order to make it meaningful in terms of impact on the market, don't you have to know the size of the stores?

A. But we don't know it in either case so we assume that whether a chain has five stores today or 205 stores its newer stores will presumably be of the bigger type because that is the trend.

Q. Do you assume that this increase in total number of stores operated by the chains of ten or more stores results from building new stores rather than acquiring existing stores?

A. It results from both. Naturally if there had been any merger—

[fol. 67] Q. Isn't it a fact that a chain such as Bob's Supermarket as selling stores to firms such as Mayfair?

A. Will you show me the reference?

(Document handed to witness.)

That is not a chain of ten or more stores.

Q. But they are selling stores to Mayfair which is a chain of ten or more stores?

A. Yes.

Q. So Mayfair is growing by acquisition?

A. That is true.

Q. There is no way of knowing what the size of Bob's Supermarket is, whether it is a \$250,000 a year store or a \$2 million a year store?

A. No way of telling it from the statistics, the size of any store.

Mr. Knight: This is your handwriting here in pencil? Did you write this up?

The Witness: No.

Mr. Knight: I am a little confused. I thought you stated on the record that you were working just this morning and you had prepared this.

The Witness: That's right. I was working on this material this morning because this list was a comparison which Mr. Von had made himself without all these figures or any [fol. 68] of this stuff on it.

Mr. Vaughn: That is my handwriting on it in pencil.

The Witness: He is telling me that he had tested my list against his information and it checked out, so I had this list and then I made this compilation myself this morning before I came here.

Mr. Vaughn: I will certainly stipulate that the handwritten part there is my own. The pencil marks are my own.

The Witness: The names of the chains, that is all you had.

Q. When you referred to the eight largest chains you are referring to the eight largest chains in terms of total number of stores operated?

A. Yes.

Q. Was that the eight largest in terms of total number of stores operated in 1953 or in 1962?

A. 1953.

Q. You have checked this table with your master sheet?

A. Yes—well, from my material taken from the master sheet, yes.

Q. When you refer to chains as newcomers since 1952, you are referring to them in terms of your exhibit? They [fol. 69] appeared as newcomers on your exhibit?

A. That's right. That is correct.

Q. You include as newcomers firms such as the Speedee Marts which you show?

A. Yes, newcomers to the area.

Q. I wonder if you could find Speedee Mart for me on this master sheet.

A. No, we couldn't find it because they are not listed in our Los Angeles—this is only a list of Los Angeles chains and Speedee Mart, Speedee Mart has its headquarters outside of Los Angeles.

Q. How did Speedee happen to be on this list?

A. Because they operate stores in the area.

Q. Why aren't they on your master list?

A. The master list includes only those chains which have headquarters in the particular cities that are in the county. That is what our directory shows.

Q. I don't understand this at all. I don't see why Speedee is on this—

A. Well, I will show you. I think it is the same explanation I gave you when you queried me about A & P. You see A & P is listed in our directories for the number of stores it operates in that unit but they are not all necessarily in the two counties that we are interested in, so I [fol. 70] will have to get that from an independent source, how many were in. I think we will find that is true of Speedee too. That Speedee Mart is not included in our master list because it is not included among the chains which have headquarters in Los Angeles or in any of the cities in Los Angeles or Orange Counties.

Q. Do I understand you correctly as saying that your master list doesn't include chains whose headquarters is outside the Los Angeles metropolitan area?

A. It includes it in the areas in which they—the directory—take Safeway for a good example. Safeway's headquarters is in Oakland. So, we don't call that a Los Angeles chain. But we do include in our compilation, not in the directory, the number of stores which Safeway operates in the counties in which we are interested.

Q. But you didn't include the Speedee Stores?

A. No.

Mr. Vaughn: I think I can clear this up if you would like for me to save a little time and right from the master list that we have been talking about.

Mr. Coyle: Let the witness do it.

The Witness: I state here at the end of the master list. Other chains with headquarters outside of the area operated stores in the area as follows:

[fol. 71] Lucky Stores, Speedee, Stater, U-Tote-Em. Their headquarters are all outside of the two counties. Page 14 of the master list.

1942

Q. You show Lucky Stores with 16 supermarkets. Is that correct?

A. It shows Lucky Stores operating 16 markets in the area.

Q. Is that supermarkets in the area?

A. Yes.

Q. What kind of stores was Speedee operating?

A. I believe bantam stores, aren't they?

Q. What is the dollar sale of a bantam store?

A. It could be \$300,000, \$500,000, it could be any amount, depending upon how successful it is.

Q. Wouldn't that make a supermarket under your—

A. Not necessarily, no. A supermarket involves the number of the items carried, the size of the store and many other things.

Q. You say that Speedee wasn't listed in 1953 but was listed in 1962. It is not listed in 1963 or 1962.

Mr. Vaughn: You are arguing with the witness. You don't have to answer that question.

Mr. Coyle: I am asking him.

Mr. Vaughn: You made a statement.

[fol. 72] A. I said that Speedee wasn't listed in our directories as operating stores in Los Angeles or Orange Counties in 1953 and it was not listed in our 1962 directory as operating stores in those counties. This information that is found on page 14 of the master list came from an independent source.

Q. What independent source?

A. From our data that we have in our offices here.

Q. What year did those 27 Speedee Stores begin operating—

A. That I don't know.

Q. They may have been operating in 1953, as far as your records show?

A. Yes, but I don't believe they were. As far as this record shows, no. I am sure our own records will show when they came into the picture.

Q. The same is true of the Lucky Stores. Your records don't indicate when the Lucky Stores came into the area?

A. No. The master sheet doesn't. I won't say that our records don't.

Q. The master sheet that you used in preparing these exhibits?

A. That's correct.

Q. And you used this master sheet to prepare this?

[fol. 73] A. And which is supplemented by other data I obtained from our regular files.

Q. Referring again to this slip of paper from which you have been testifying, this paper shows the Lucky Stores and the Speedee Stores as opening up in the Los Angeles metropolitan area subsequent to 1953, does it not?

A. It would indicate that in 1953 we didn't have them listed.

Q. But it wouldn't be indicated from your work sheet, it would be indicated from this sheet of paper that Mr. Von wrote out and showed you?

A. The fact that it wasn't in the work sheet would indicate that they weren't in the area in 1953. As a matter of fact, I am just looking up Lucky Stores in the directory, and that is listed in San Leandro. That is where their headquarters is. They operate stores in Arizona, California and Washington.

Naturally, we don't include them in our listings when we come to discuss chains operating in—with headquarters in Los Angeles and Orange Counties.

Q. Could you look up Safeway in your listing?

A. We don't list Safeway as being in Los Angeles, under the geographical heading of Los Angeles. We say that they occupy a division office operating 190 stores in the following states and counties. California, about half a dozen or a dozen states, Nevada, and so forth. This is not an entry that would appear in our master list showing the number of chains with headquarters in the counties that we are interested in.

Q. As a matter of fact, in your master list, did you or did you not treat Safeway differently than you treated Lucky Stores and Speedee?

A. No, I didn't. I treated them exactly the same. The master list had no data for Safeway. As I say, that was inserted later as you can see by the red ink figures.

Q. From some outside source?

A. Yes.

Q. You did have beginning data on Safeway?

A. From some outside source. The master list shows no more information about Safeway because its headquarters are in Oakland than it shows about Lucky because its headquarters are in La Jolla. They are identical treatment.

Q. But you got more information on Safeway from this outside source?

A. Yes, I did. It could be for all I know that Speedee was not operating in 1953.

Q. You don't know?

A. I don't know.

[fol. 75] Q. It may or may not?

A. I rather think it wasn't. I think it is a relatively new chain myself.

Q. But you don't know?

A. No.

Mr. Coyle: I have no further questions.

By Mr. Vaughn:

Q. Sir, don't you have some further information about Lucky in the master list?

Mr. Coyle: You are leading the witness. It is your witness.

Q. I'd like you to refer to your master list and specifically page 7 and the entries behind the name Jim Dandy. Does that tell you anything about when Lucky entered the market?

A. No, it only tells me when Lucky acquired the Jim Dandy Stores. They might have been in the market. I am not sufficiently familiar with their history. They might have been in existence before they acquired the Jim Dandy Stores.

Q. That entry "New Lucky" doesn't mean there is a new entry in this market for Lucky, I take it?

A. No.

Q. Do you know whether Mayfair has acquired more stores than it has sold in the last decade?

[fol. 76] A. I couldn't say offhand.

Q. Finally, referring to the piece of paper which we have referred to here on which appears my handwriting and yours, I gave this to you, did I not, Mr. Lebar, yesterday

to merely show some work that I had done to confirm the work that you had done?

A. That is correct.

Q. Did I ask you to make any computation based upon anything that I had handed you?

A. I do not.

Q. Did I suggest any change?

A. You did not know anything about it until I mentioned it here.

Q. Did I suggest any change be made in what you were going to say today by reason of anything on this piece of paper?

A. No, sir.

Q. And any impression to the contrary which may have been created by Mr. Knight or Mr. Coyle's questions is inaccurate, is that correct?

Mr. Coyle: You should not characterize us—

Mr. Vaughn: You characterized me, Mr. Coyle, and I will characterize you. I have nothing further. Mr. Lebhar, [fols. 76a-77] would you stipulate to waiving the signing of your deposition in this case with the understanding that counsel will review it and if they regard it as accurate they will waive your signature also and stipulate to that waiver?

The Witness: I so agree.

(Whereupon, at 12:40 p.m., the deposition was closed.)

[fol. 2249] IN UNITED STATES DISTRICT COURT

Transcript of Proceedings—June 14, 1963

DEFENDANTS REST

Mr. Vaughn: Defendants rest.

The Court: Does the government have anything?

Mr. Coyle: Yes. We have two witnesses.

The Court: I see it is almost 10 after 11:00.

Are your witnesses here and ready?

Mr. Coyle: Yes, your Honor.

The Court: Suppose we take a 10-minute recess.

(Recess taken.)

[fol. 2250] The Clerk: I have marked Plaintiff's Exhibits 83, 84 and 85 for identification.

(The exhibits referred to were marked Plaintiff's Exhibits 83, 84 and 85 for identification.)

Mr. Coyle: Your Honor—

The Court: All right.

Mr. Coyle: If your Honor please, I think as part of the defendant's case, we would like to offer the deposition of Ray King.

Mr. Alsop: Roy King.

Mr. Coyle: Roy King, who is one of the defendant's witnesses. We didn't offer the deposition at the time his affidavit was offered through inadvertence.

The Court: Now wait a minute. You are confusing me, you say one of the defendant's—

Mr. Coyle: One of the defendant's witnesses.

The Court: One of the defendant's witnesses.

Mr. Coyle: Yes, your Honor. So we ask that that be recorded in the transcript.

The Court: Well, I will reopen the case.

Mr. Vaughn: We have no objection, your Honor, to the deposition of Mr. Roy King being copied after his affidavit.

The Court: All right. The reporter will do that.

The Clerk: I don't find the original.

DEFENDANTS' EXHIBIT BB

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF ROY KING

STATE OF NEW YORK,
County of New York, ss:

ROY KING, being first duly sworn, does hereby depose and state as follows:

I am a sales and marketing consultant to the food industry. Prior to October 1961, I was the Editor of Food Topics, the nation's largest supermarket trade journal, and the Editor of Food Field Reporter, the nation's leading grocery manufacturer business journal. I was also Vice President of Marketing of both Food Topics and Food Field Reporter.

For 12 years, I operated a supermarket of my own. I have also developed a shopping center and worked in the New York City produce market. I have performed consulting services for such organizations as:

H. C. Bohack Co. (large L. I. chain)
National American Wholesale Grocers Association
United States Wholesale Grocers Association
Grocers Wholesale Cooperative of Des Moines
National Association of Transportation Advertising
Flickinger & Company Wholesale Grocers
Cooperative Food Distributors of America
Red & White Convention
Associated Grocers of Oklahoma
Associated Grocers of Kansas City
Associated Grocers of St. Louis
Point-of-Purchase Advertising Institute
British Columbia Grocers Association
Iowa State Retail Grocers
Massachusetts State Retail Grocers
Associated Grocers Cooperative of Atlanta
New England Sugar Company Convention
San Francisco Advertising Club
New England Wholesale Grocers

The University of Wisconsin's Advanced National Seminar
 The Lansing Food Distributors in Lansing, Michigan
 The Kalamazoo Food Distributors in Kalamazoo, Michigan
 The Grand Rapids Food Distributors in Traverse City, Michigan
 The Traverse City Food Distributors in Traverse City, Michigan
 The Canadian Wholesale Grocers Association
 The Flint Food Distributors in Flint, Michigan
 The Detroit Food Distributors in Detroit, Michigan
 The Toledo Food Distributors Association in Toledo, Ohio
 The Michigan Food Dealers Association
 The Associated Grocers of Colorado
 The Allied Food Club of St. Louis
 American Association of Advertising Agencies
 Packaging Institute
 General Foods Packaging Clinics
 American Marketing Association
 Book Publishers Council

I have written extensively on problems of interest to retail grocery companies and their suppliers. Recently, I was awarded the Sylvania Electric Company's award for outstanding service to the food industry.

In 1957 and 1958, a group of qualified and trained research personnel of Food Topics, under my supervision and direction, conducted a survey and analysis of the retail grocery business in 17 metropolitan areas. They were New York; Long Island; Detroit; Pittsburgh; Charleston, South Carolina; Chicago; Minneapolis-St. Paul; Miami; St. Louis; Houston; Kansas City; Atlanta; Syracuse; Denver; Washington, D. C.; Montreal, and Los Angeles.

In the course of these surveys, extensive interviews of retailers, wholesalers, suppliers and representatives of food associations were conducted. Statistics were gathered from all sources deemed significant at the time. Ultimately, reports were made of the findings of the Food Topics staff. Those reports appeared in article form in

various issues of Food Topics and were later reissued in a separate publication entitled, "Food Topics Visits Major Marketing Areas", (Exhibit —). The results of Food Topics' survey insofar as they relate to the Los Angeles metropolitan area may be summarized as follows:

1. *The retail grocery business in Los Angeles is exceptionally healthy, dynamic, vigorous and growing.*

2. *No chain or group of chains can claim dominance of the market.* In 1958, Safeway, the area leader, had only about 10% of the market in terms of sales. The leading 39 chains enjoyed only approximately 56%. Compare these statistics to Detroit, for example, where the five largest national chains have approximately 52% of the market; or Pittsburgh, where A & P alone has 25.6% of the market and the leading three chains claim approximately 50%; or Chicago, where in 1958, such national chains as National Tea Co. had 224 stores, Jewel Tea 173, A & P 191, and Kroger Co. 89; or Kansas City, where four chains do 57% of the grocery business; or Atlanta, where five national or regional chains control almost 70% of the market.

3. *Independents and smaller chains are competing effectively and doing very well in Los Angeles, primarily because of their affiliation with strong cooperative buying organizations.* Food Topics' surveys across the country show that even in areas dominated by chains, the key to the success of independents seems to be the relative strength of cooperative buying organizations. Where such "co-ops" are strong, independents are strong. Where co-ops are relatively weak, so are the independents. For example, in Atlanta, where 5 chains control 70% of the market, independents are still competing quite successfully. The obvious reason is the independents' affiliation with Associated Grocers, a good retailer owned cooperative. Additional examples of independent strength through affiliation with cooperatives can be found in Kansas City, Chicago, Miami and other cities. Likewise, statistics show that in the past few years, the greater increase in grocery store volume and net profits (both indications of superior merchandising ability) has occurred in stores operated by independents affiliated with large, aggressive cooperative movements. In Los Angeles, we found Certified Grocers of

California, a retailer owned wholesale grocery company which is the largest and possibly the most successful organization of its kind anywhere in the country. While cooperative buying is almost an innovation in many areas, Certified has been a strong factor in the Los Angeles market for 35 years. Most of the areas largest chains had their beginnings as members of Certified. In 1958, Certified had 967 members who in turn operated 1,468 stores, and Certified's subsidiary, Spartan Grocers, had a membership of 1,271, operating 1,306 stores. In addition, orange Empire Co-op, a large and growing voluntary cooperative doing business in four states and sponsored by A. M. Lewis, Inc., had 1,014 member stores in 1958. I estimate that 65% of all of the stores in Los Angeles and Orange Counties are affiliated with a cooperative buying organization. As a result, independent grocers, concerns with 1, 2 or 3 stores, are successful in Los Angeles. In the words of one of them, "We've never had it so good." In addition to the advantages gained from cooperative buying, and the other services rendered by organizations such as Certified, the independent has other advantages, such as being able to cut out supervisory and other overhead expenses and the ability to move more quickly and easily to meet local competitive conditions than in the case of a chain. Also of considerable importance in an area such as Los Angeles where new communities are springing up and new residents coming in every day, and where by and large, people have no lifelong or immutable buying habits, is the independents' ability to deal with customers on a personal level, to become an active participant in community affairs and to gain thereby the friendship and loyalty of nearby consumers. But for whatever reason, it is obvious that independents have prospered in Los Angeles, and there is no reason to expect that they will not continue to do so.

Since Food Topics visited Los Angeles, Von's and Shopping Bag have merged. I have given considerable thought to the possible effect of that merger in the light of my knowledge of the grocery business in Los Angeles. I have reached the opinion that the Von's-Shopping Bag merger could not possibly affect the competitive situation in Los Angeles adversely. First of all, few Von's stores were located close enough to a Shopping Bag store to draw

customers from the same area. Hence, there was very little competition between the two companies. Second, I cannot see how the merger of those two concerns could adversely affect the competitive opportunity of smaller concerns, particularly in view of the strength of the independents in the Los Angeles area. I know of no reason why an independent could not compete as effectively against Von's now as it did against either Von's or Shopping Bag before the merger. Finally, I am firmly of the view, in light of all the circumstances prevalent in the Los Angeles area, that the merger in question will not lessen the vigor of competition in grocery retailing or lead in any way to dominance of the market by any chain or group of chains.

Roy King.

Subscribed and sworn to before me this 17 day of October, 1962

Olga A. Shackel, Notary Public, State of New York,
No. 31-8930550. Qualified in New York County.

Commission Expires March 30, 1964

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[fols. 1-2]

DEFENDANTS' EXHIBIT BB

IN THE UNITED STATES DISTRICT COURT

No. 336-60 CC

[Title omitted]

Deposition of ROY M. KING, taken on behalf of the Plaintiff, at Room 806, Federal Building, Los Angeles, California, commencing at 2:15 P.M., Friday, May 24, 1963, before Harold M. Leibovitz, C.S.R., Notary Public, pursuant to oral stipulation.

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[fol. 3] ROY M. KING, having been first duly sworn, deposed and testified as follows:

Direct examination.

By Mr. Hughes:

Q. Mr. King, would you state your full name for the record, please.

A. Roy M. King.

Q. What is your home address?

A. 15 Calla Court, Rockville Center, Long Island, New York.

Q. What is your business address?

A. 100 East 42nd Street, New York City, New York. Roy King Associates.

Q. In what business are you engaged?

A. I am in the food marketing consulting business.

Q. What type of marketing consulting do you do?

A. We consult with food firms, suppliers to the trade, grocery retailers, discount houses, drug operations. Anybody that has a stake in the distribution of a product, packaged food products. Primarily through food stores or drugstores or discount operations where food store operations are involved.

Q. Do your clients come from any particular section of [fol. 4] the country?

A. No. They are reasonably national. I mean national in the broad sense of the word.

Q. What other background have you had in this marketing consulting field?

A. Ten years as editor in chief of Food Topics and Food Field Reporter, which circulationwise are the largest food trade papers in the food industry. And 12 years with my own markets, as a market operator in Long Island, Country Garden Supermarkets.

Q. That was prior to your going with Food Topics?

A. Yes.

Q. Are you still associated with Food Topics?

A. No, I am not.

Q. Is Roy King Associates associated with Food Topics?

A. No, they are not.

Q. What was the date that you left Food Topics?

A. Officially October 1, 1961.

Q. As Roy King Associates have you made any marketing research studies in the Los Angeles area?

A. No, we have not.

Q. Have you made any—

A. Excuse me. You are referring to now Roy King Associates?

Q. That's correct.

A. No.

[fol. 5] Q. Since October '61.

A. No, sir.

Would you please define what you mean by "marketing surveys of the Los Angeles area"? We have occasion for many clients to advise with respect to particular marketing practices in various areas of the country. What do you mean by "marketing research in the City of Los Angeles"?

Q. Have you been—

A. I want to answer this in full honesty. I am not trying to—

Q. Let me state it this way. Have you had any clients which were engaged in the marketing of groceries in the Los Angeles metropolitan area since October 1961?

A. Presently engaged.

Q. Since October '61.

A. Or who were engaged? No. Well, I would have to take

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that back. Yes, I do. I have a client who is engaged in marketing, the Coca-Cola Company.

Q. The Coca-Cola Company?

A. Yes. That is in the Los Angeles area.

Q. They are not engaged in the marketing of retail groceries.

A. No.

Q. What experience have you had in looking into the Los Angeles metropolitan area at the time you were with Food Topics magazine?

[fol. 6] A. Well, at that particular time—Again the question is rather broad, "experience." I have made numerous speeches concerning the distribution of food products in grocery stores in the Los Angeles territory. I have counseled with many suppliers directly located in the Los Angeles trade area.

For example, Carnation Milk Company comes to mind. Coca-Cola of Los Angeles, when it was owned by the Barbee Bros. here in the Los Angeles area. And, of course, we also did a rather thorough study on the Los Angeles market area with respect to food operations for the publication under the general title of "Food Topics Visits." Where Los Angeles, you know, was another market among many.

Q. Does your primary experience with the Los Angeles market, that is Los Angeles and Orange Counties, which is what we mean by the Los Angeles marketing area, consist of the data you obtained at the time you made this publication, "Food Topics Visits Major Marketing Areas"?

A. I am having a little bit of difficulty in hearing you, sir.

(Discussion off the record.)

Mr. Alsup: On the record, just to clarify something, Mr. Hughes, the publication you have just referred to is a composite publication of articles which appeared in a series of issues of Food Topics magazine. You are aware of that fact?

Mr. Hughes: I am aware of it now if I wasn't before.

[fol. 7] Mr. Alsup: I think it is indicated in his affidavit, is it not?

Mr. Hughes: Yes, it is.

Mr. Alsup: Page 3 of his affidavit.

Mr. Hughes: Q. Mr. King, my question to you was: Has your primary experience in the Los Angeles marketing area consisted of the tabulation of the data and other information which appears in this Food Topics magazine entitled "Food Topics Visits Major Marketing Areas"?

A. Again I am sorry but I don't understand this question. What do you mean by "major marketing experience"? I just want to be sure that I answer this question correctly. I would like to know the full import and what this question means.

Mr. Hughes: Will you read the question back, please.

(The reporter read the pending question.)

The Witness: I would have to weight that question and say it is one of many experiences I have had in Los Angeles.

Mr. Hughes: Q. Is this one of the more thorough studies which you have made of the area?

A. Oh, yes; oh, yes. It is the most thorough study we have made of the area.

Q. Have you your statement before you, "Affidavit of Roy King"?

A. Yes, sir, I have.

Q. On Page 3 you refer to "Food Topics Visits National [fol. 8] Marketing Areas." That is meant to be "Food Topics Visits Major Marketing Areas"; isn't it? Is this the same publication?

A. It should be "Major." Major marketing areas. I guess that is a misprint.

Mr. Knight: Rather than "National."

Mr. Alsup: While we are at it, Mr. King indicated to me that there was one other correction that he wished to make in this affidavit.

Mr. Hughes: Q. Would you like to make another correction on this affidavit for the record, Mr. King?

A. Yes, we would. I believe it's on Page 5 where it says, "In addition, Orange Empire Co-op, a large and growing voluntary co-operative doing business in four states and sponsored by A. M. Lewis, had 1,014 member

stores in 1958." "Los Angeles and Orange Counties" should be struck out.

Q. I recall that on Page 4 you have already corrected, 11 lines from the bottom of the page, the word "association" to read "associated."

Mr. Alsup: That was corrected in the copy that was given to you.

The Witness: Associated Grocers.

Mr. Hughes: Q. Have you ever lived in the Los Angeles area, Mr. King?

A. No, sir, I have not.

Q. Have you spent much time out here?

[fol. 9] A. Again, you see, Mr. Hughes, "much time" is a relative term. What do you mean by "much time"?

Q. How much time have you spent out here?

A. That would be hard to calculate. For a businessman in the East to come to Los Angeles six times a year, I would say that that is quite a bit of time, you know, where you would spend perhaps a week at a time, to me this would mean a lot or much. It may not mean much to you or somebody else.

Since 1952 I have visited for various business reasons the Los Angeles area, I would guess on an average of at least six times a year and I would say the entire West Coast would probably be more than that, maybe eight or ten times a year.

Q. On Page 34 of Food Topics—

Mr. Hughes: I might as well identify the article on Pages 34 and 35 of Food Topics magazine as King Exhibit No. 1 for Identification. I believe it is dated January 1, 1961.

(The document referred to was marked by the notary public as King Exhibit No. 1 for Identification and returned to counsel for the plaintiff.)

The Witness: May I just complete my statement?

As an afterthought, thinking about your term, "have I been here much, SAY IF I were here on an average of six times a year and I have been doing this since 1952, conservatively I would say that I had visited the Los Angeles [fol. 10] area approximately 60 times in the last ten years.

Mr. Hughes: Q. Did you personally come out to Los Angeles to make any part of the reporting which appeared in this particular article?

A. No, sir, I did not.

Q. When was this actual survey made?

A. Oh, dear, I don't have the exact dates. The actual survey was made, I believe—I want to be very careful about this. Can we go off the record for a second or not?

Q. Go ahead.

(Discussion off the record.)

The Witness: It probably either was November or December—To the best of my knowledge it is somewhere around December or November of '59. I don't have the exact date but we could obtain it for you.

Mr. Hughes: Q. That is the original article, not this publication.

A. No. You see, this particular publication was a compilation of all the articles we had done on various visits to markets around the country and was really—what appears here in this booklet is the exact text that appeared in the original article. And this was for the benefit of the trade, in order to make things easier, to give them a compiled book.

I do not, unfortunately, have the exact date that you are looking for.

Q. I was confused by the back page of this article which [fol. 11] has the date January 1, 1961 on it.

A. Well, that is—Where is that, sir?

Q. On the back cover.

A. Well, that refers to the date of this particular publication.

Mr. Alsup: I should state for the record, Mr. Hughes, that we know it was prior to March 25, 1960 because a copy of this article with reference to Los Angeles was introduced in evidence at the hearing held on March 25, 1960.

Mr. Knight: And this is a compilation of several articles which had been done; is that right?

Mr. Alsup: In various issues of Food Topics, which I have seen, in which there appeared articles relating to different marketing areas.

Mr. Knight: And here he has put them in one place.

Mr. Alsup: And the witness has testified that in January 1961 they culled out these articles from prior publications and put them into one book.

The Witness: For the benefit of the trade, that's all.

Mr. Knight: Thank you.

Mr. Hughes: Q. Mr. King, referring to this article on Page 34, who actually wrote the article for Food Topics?

A. The actual writing of the article?

Q. Who did the writing?

A. It was done by the editorial staff of Food Topics.

Q. Who did the writing? That is who accumulated the [fol. 12] information?

A. We had several reporters in the Los Angeles area reporting on this particular survey.

Q. Are these Food Topics reporters or newspaper reporters?

A. They are Food Topics reporters. They are employed and paid by us.

Q. What part did you play in the publication of this article?

A. I edited it. I performed the normal functions of the editor of a trade paper that any article would receive that would appear in the publication.

Q. I assume that you edited this entire edition of the Food Topics magazine.

A. When you say "edit," again we have a word, unfortunately, Mr. Hughes, that has a number of different connotations. We had an extremely large staff at Food Topics and Food Field Reporter. I had under my direct control and employ about 35 people, many of whom worked, you see, on this particular article in terms of writing, in terms of layout, in terms of artwork, in terms of other functions that would have to go into it in order to make it a readable article.

Q. Mr. King, what has your formal education consisted of?

A. I am a college graduate.

Q. Where did you graduate from?

[fol. 13] A. Penn State.

Q. When was that?

A. 1940.

Q. What degree did you get at that time?

A. Bachelor of Science.

Q. What did you major in?

A. Agriculture. Produce, specifically.

Q. Have you any other degrees?

A. No, sir.

Q. Have you had any further technical training in the marketing consultant field?

A. Technical training? I think I have the best training in the world—experience.

Q. Are you familiar with the strike which occurred in the grocery industry in Los Angeles in January 1959?

A. Yes. We reported partly on that strike.

Q. How long did that strike last?

A. The exact time of that strike? The exact time escapes me. The exact timing escapes but I believe—The exact time escapes me.

Q. If I suggest it was January 1959 and that it lasted for a period of a month, would you recall what effect that had on the retail grocery industry in Los Angeles?

A. Yes. We reported on that in this particular article. I turn to Page 36 and it says here: "But, the biggest surprise to most chain operators was to come in the post-strike [fol. 14] period. Today, almost a year since the end of the strike and the reopening of the stores, some of the larger chains have not recovered their pre-strike sales volume."

Q. Was that a big surprise to you that they had not recovered, based upon your experience in the grocery industry?

A. No.

Q. How long would you say it takes the grocery industry to recover from such a strike?

A. Again, you see, it is very hard to apply yardsticks to something like this. There are so many factors that enter into a picture and can affect a given situation that to categorically state it is going to take three months to recover, six months to recover, or a year to recover would be rather difficult to state. But I would like, if I may, to read on to you about this. May I?

Q. Go right ahead.

A. "Executives of these chains agree that it is difficult to regain lost volume. Some of this volume has gone to the firms which, open during the strike, introduced their new

customers to trading stamps. Some of the volume has been lost to home delivered milk and bakery products, which naturally enjoyed a huge increase in business.

"But even of more interest—and some surprise—to the operators of the huge 'chrome-plated' supermarkets is the amount of business retained by the medium-sized, well-managed stores that remained open during the strike period.

[fol. 15] "Some of the individual operators interviewed by Food Topics claimed that they are still ringing up as much as 7 per cent more business than before the strike, and they are getting it from customers who were pleased with their service and are continuing to shop in their stores.

"A fair estimate of the amount of business lost by the major chains during the strike, several executives agree, is 5 per cent. But, as one of the top chain executives said, 'Each dollar lost off the top hurts, and leaves a gap in net profits.'

"Many of the industry executives attribute the slow recovery of pre-strike volume to competition from new stores. However, hardly anyone complains of overbuilding."

But here is one of the most important things that I think should also be included. Walter Ralphs, one of the most important men in the food business in the United States, and certainly a leader in Los Angeles, said as follows, and may I quote this also?

Q. That goes beyond the strike part of this.

Mr. Alsup: It relates to the same thing.

The Witness: It is part of the contention, you know, and I think it is important. It is all under the same subject and it is very important. It casts a light on this whole thing.

Mr. Hughes: Q. Who are these people you are including?

Mr. Alsup: Let him finish his answer, please, Mr. Hughes.

[fol. 16] Mr. Hughes: He is reading someone else's quote, I believe.

Mr. Alsup: He has referred to Mr. Ralphs, he said.

The Witness: Yes.

Mr. Hughes: I object to your reading the testimony of someone else into the record.

Mr. Alsup: Now go ahead, Mr. King.

The Witness: "Walter Ralphs, Jr., one of the third generation Ralphs now guiding the area's oldest chain, told Food Topics:

"'More fine stores are available to customers than ever before, both in absolute numbers and in ratio to customers. So the business is split up among more stores. But business, except for an individual store here and there, is very good.'"

Mr. Hughes: Q. You are quoting someone else?

A. I am quoting Walter Ralphs, Jr., who is one of the most respected men in this industry.

Q. In this article, then, Mr. King, Food Topic reports that over a year after the strike the chains were still feeling the aftereffects of the strike; is that correct?

Mr. Alsup: I object to the question on the ground that it states facts not in evidence, when you say "over a year." Let us quote it correctly.

Mr. Hughes: This apparently is a 1959 article originally. [fol. 17] Can you obtain the date of the original article for us, Mr. Alsup?

Mr. Alsup: I will be more than happy to.

Mr. Vaughan: It says, "nearly a year" in the article.

Mr. Alsup: It says "almost a year."

The Witness: Oh, boy, it is a good thing I am not a lawyer.

Mr. Hughes: Q. In your experience, Mr. King, is there anything about the Los Angeles metropolitan area which makes it different from other metropolitan areas throughout the country? For instance, is it more mobile?

A. Well, of course it is. Sure, there are differences.

Now, again, Mr. Hughes, I don't wish to net pick here but I would like to know: What do you mean by "more mobile"? More mobile than what or who or which?

Q. To your knowledge has the Los Angeles more people driving around in cars than most other parts of the country, from your own investigation?

A. To my knowledge—I have never made a study about

how many people ride around in cars in Los Angeles. I am no expert on this. I can give you an impression.

It would seem to me that looking at your freeways you've got a helluva lot of people moving around in automobiles. But I don't know if this is more or less than in other areas of the country. I can't quote you any statistics or figures on this. I can say that it looks like this might be the case [fol. 18] but I couldn't be sure.

Please don't misunderstand my attempt to answer your question to be snide or in any way disrespectful. I don't mean it that way at all. But I am accustomed to precise terminology, and unless I can get it I cannot answer a question intelligently unless I know that we are both talking about the same thing.

Q. Would you call this a fragmented grocery industry, Mr. King, as opposed to being concentrated?

A. Mr. Hughes, will you describe to me what you mean by the word "fragmented"?

Q. I am not answering the questions. I will rephrase it.

Mr. Alsup: If you are going to use the term, Mr. Hughes, you better know what you mean.

The Witness: How can I answer a question, sir, if I don't know we are both referring to the same terminology? "Fragment" to me means pieces.

Mr. Hughes: Q. Is this a grocery industry which is in many pieces as opposed to one being concentrated?

Mr. Alsup: By "this" you are referring to the Los Angeles metropolitan area?

Mr. Knight: Yes, sir.

Mr. Alsup: You are referring to all tiny pieces, Mr. Hughes, or tiny pieces plus bigger pieces?

Mr. Knight: Pieces the way he uses it.

[fol. 19] The Witness: I didn't use it in any other way.

Mr. Alsup: We will find out what Mr. Hughes means.

Mr. Knight: He said "fragments" means "pieces" to him.

The Witness: Are you talking about large pieces, small pieces, medium pieces or in-between pieces?

Mr. Hughes: Let us go off the record a second.

(Discussion off the record.)

Mr. Hughes: Q. In your observation of the Los Angeles area have you observed that there is a trend towards concentration in the grocery industry, and by that I mean has the top ten grocery chains achieved the much larger share of the market than they had for several years back?

Mr. Alsup: I object to the form of the question on the ground that it is confusing and ambiguous. The time period is indefinite, the top ten is not identified and it assumes a trend in concentration.

Mr. Hughes: I will strike that question.

Q. Are you familiar with any mergers or acquisitions which have occurred in this market in the past ten years?

A. Yes.

Q. Can you name them for us?

A. Well, yes, I can name some of them. I am not sure I can name all of them. Von's-Shopping Bag merger was one. Let me see. I believe Alpha Beta-Raisin's was another within ten years. There were acquisitions of stores by Fox Markets, there were acquisition of store by—

[fol. 20] Q. Do you know what markets Fox acquired?

A. Which ones?

Q. Yes, sir.

A. Not offhand, no. There were some.

Q. What is the status of Fox Markets today?

A. Oh, they are bankrupt.

Q. Do you know any other acquisitions in the area in the past ten years?

A. Yes. It seemed to me that Greater American acquired stores in the last ten years.

Q. Who did they acquire?

A. Again I couldn't be specific as to which stores they were. They were individual stores. I know that they were acquired. Yor-Way, I believe, also acquired some stores. Again I couldn't be specific as to which ones without checking the record. That is about the size of it, I guess.

Q. Do you know if Food Giant has acquired any stores?

A. Acquired stores?

Q. Acquired or merged with.

A. It seems to me there have been some acquisitions there. Again I don't know specifically without checking our records which stores were acquired.

Q. You stated that Alpha Beta acquired Raising Markets a few years back. Do you know the status of Alpha Beta today?

A. Today? Yes. I believe Alpha Beta is controlled by [fol. 21] Acme.

Q. Do you know if Mayfair has made any acquisitions in the past ten years?

A. Offhand I don't know for sure.

Q. Do you know if McDaniels has made any acquisitions?

A. McDaniels has, I believe, acquired some stores.

Q. Do you know when Lucky Markets came into the area?

A. Yes. But that wasn't a merger. That was—I forget what the government terms this. It is an extension or something similar to this, or extension of market. That wouldn't be considered a merger. No more than, I would presume, that Food Fair acquiring some of the Fox markets would be considered a merger but rather an extension, you know, of an Eastern chain coming into the Western market.

Q. You mentioned that Fox Markets was bankrupt. Do you know the status of McDaniels Markets today?

A. They are also out.

Q. What happened to their stores, do you know?

A. As far as I know they—Well, I am not sure, you see. I am not certain as to what happened to them but all of this would seem to me to point up that there is a constant shifting and flow in this market. And what was big when we made this study, things change, times change.

Q. Mr. King, in your affidavit you state that 65 per cent of all stores in Los Angeles and Orange County are affiliated with a co-operative buying organization. To your [fol. 22] knowledge are the other 35 per cent of the independents affiliated with any similar type organization?

Mr. Alsup: I object to the form of the question on the ground that it is confusing and ambiguous. I don't know what you mean by "the other 35 per cent of the independents."

Mr. Hughes: Of the stores. Excuse me.

Would you read the question back, please.

(The reporter read the pending question.)

Mr. Hughes: Q. I would like to rephrase that question and ask you: To your knowledge to the remaining 35 per cent of the stores in Los Angeles and Orange Counties belong to any similar type of buying group?

A. To my absolute knowledge on the balance of the 35 I would have no way of knowing. This could not be determined unless we surveyed all 35 per cent.

Q. You stated in your affidavit, Page 5, or you infer that there are some advantages to be obtained from belonging to a co-operative buying group. Do you know what lines of grocery products can be purchased through Certified?

A. Oh, yes. I am well acquainted with Certified.

Q. What lines do they sell?

A. Primarily grocery and non-foods.

Q. Do they carry dairy products?

A. Some dairy products but not—Again, you see, you have to define these terms, Mr. Hughes.

Q. Do they carry liquid milk products?

[fol. 23] A. No, they do not.

Q. Do they carry ice cream?

A. No, they do not. However, you see a statement like this begs an answer. The important thing is that the Certified Grocery Company, probably today the world's largest co-op—

Q. Mr. King, I believe you answered the question.

Mr. Alsup: I don't believe he has. The witness is entitled to complete his answer.

Mr. Hughes: All I asked is: Do they sell liquid milk?

The Witness: Yes. You see, sir, in order to clarify this picture it is important—

Mr. Hughes: Q. They either sell it or they don't.

A. Yes, I understand that they either sell them or they don't. But it isn't necessary for them to sell it.

Mr. Alsup: Complete your answer, please, Mr. King.

Mr. Knight: Does Certified sell ice cream?

Mr. Alsup: Mr. Knight, there was a question pending and the witness started to answer it and he is not being permitted to answer it and I am not going to stand for harassment of the witness.

You may complete your answer, Mr. King.

The Witness: No, Certified does not sell ice cream per se

as Certified. But this is no problem to the independent who belongs to a co-op like Certified or Spartan or Lewis Grocery Company, or something like that, because in many in-[fol. 24] stances where perishables are concerned, whether it be ice cream or whether it be produce or whether it be meats or whether it be certain dairy products not carried by the Certified warehouse, which has to be obtained through outside sources, these independents can outcompete the chain six ways from Sunday.

Now, if you would like to know why they can do this I can answer that too.

I take it nobody wants to know why. Yes or no? No?

My mother told me never to volunteer.

Mr. Hughes: Q. Mr. King, I would like to show you an exhibit which I believe has previously been identified as Dick Exhibit No. 3.

Mr. Alsup: I have an objection to this before any question is asked about it.

Mr. Hughes: Make your objection.

Mr. Alsup: I object to asking questions of the witness concerning an exhibit which bears no identification, the source and foundation for the figures not having been laid and containing a misleading label entitled "Changes In Concentration," and so on.

I have made my objection and now if you wish to ask questions concerning it in view of that objection, you may.

Mr. Huges: Q. Mr. King, would you look at this exhibit, which is Dick No. 3, and look at the share of the top 20 chains in the Los Angeles market for 1948 and 1958. What [fol. 25] do you observe about their market share?

A. From—

Mr. Alsup: Just a minute.

I would like to ask a question on voir dire.

Mr. King, do you have any knowledge whether or not this exhibit is accurate?

The Witness: I wouldn't. You see, this is just the point that I was going to make here. It is amazing what you can do with charts, graphs, figures, et cetera. I would have to know—There are a few more pieces of information that I would have to know about this. Would you mind explaining what all this means?

Mr. Hughes: Q. Mr. King, I only asked you to look at the top 20.

A. Yes. Which are the top 20?

Q. The very top of the chart.

Mr. Alsup: Mr. Hughes, would you explain to Mr. King who the top 20 were in 1948 and who the top 20 were in 1958?

Mr. Hughes: I am not answering the questions here.

Q. I would like to explain to you that these figures supplied by the Bureau of the Census—

Mr. Alsup: Are you testifying to that, Mr. Hughes?

Mr. Hughes: These figures are not yet in evidence.

Q. The government believes that the top 20 chains in this Los Angeles area had 43.8 per cent of the market share of the grocery business in this area in 1948 and they had 56.9 [fol. 26] per cent in 1958.

A. The top 20?

Q. The top 20.

A. The same 20?

Mr. Alsup: Are you so stating, Mr. Hughes, that they are the same 20?

Mr. Hughes: Q. These are just the top 20.

A. You see, this—

Q. I haven't asked a question yet.

A. I mean what is implied here is erroneous research, sir. We have got to get something more specific than that. Are we talking about bananas and bananas or are we talking about apples and bananas?

Q. Mr. King, I am going to ask you one question. In your observation of the Los Angeles market between 1948 and 1958 have you made any studies or have you observed on your own or through your marketing service or your Food Topics work the fact that the top 20 chains have gone from 43.8 per cent to 56.9 per cent?

A. We didn't say that. But we have made studies and they don't agree with those figures completely.

Q. What have your figures found?

A. It seems to me that we said here that 39 chains, at the time this study was made, and on the chains on which we

reported, those 39 chains did 56.3 per cent of the business. That is what we show. Or we have estimated this.

[fol. 27] Q. What was your estimate based on?

A. These estimates are based on very, very competent sources. The sources used by every trade journal in the United States, business papers, and sources used by the Federal Trade Commission, for example, powerful local media. And in this particular instance these figures were supplied by the Los Angeles Herald Express.

Q. Have you any idea where the Herald Express got these figures?

A. Do I have an idea?

Q. Do you know where they got the figures?

A. Yes, we know where they get their information from. This is common knowledge. They get it by direct question and answer. And where they cannot get it by direct question it is estimated. There are various gauges that they use for this estimate.

Q. Do you know how many of these chains listed on Page 35 estimated their answers?

A. Sir?

Q. Do you know how many of these major chains or smaller firms listed on Page 35 estimated their answers?

A. Let me rephrase this, please, so I am sure I know what you are saying. Do I know how many of these chains listed on Page 35 estimated their answers to the Herald Express?

Q. Please.

A. No, I would have no way of knowing this. But this [fol. 28] would not be for me to question. This is an accepted source as is media in other cities around the country. We constantly use their figures and so do our competitors. So does the Federal Trade Commission, I might answer.

Q. On Page 5 of your affidavit, Mr. King, in the sentence where you previously made a correction referring to Orange Empire, you state that Orange Empire had 1,014 member stores in 1958.

A. Correct.

Q. To your knowledge how many of these stores were located in Los Angeles or Orange Counties?

A. No, we do not have an exact number of stores located in Los Angeles or Orange County. No, sir, we do not. But it

is a goodly share, depending upon what you mean by the term "goodly."

Q. That is your term, Mr. King.

Mr. Hughes: I have no further questions.

Cross examination.

By Mr. Alsup:

Q. Mr King, you testified that Fox made a number of acquisitions in the past ten years and then went into bankruptcy. You showed Fox Markets in 1958 as having the ninth largest share of the market; is that correct?

A. That's correct.

[fol. 29] Q. Do you know what happened to Fox Markets subsequent to that time?

A. Yes. They went into bankruptcy, as I said, and the stores were sold off.

Q. You saw McDaniels as No. 11 in terms of share of the market and you testified that McDaniels had made some acquisitions in the past ten years. What happened to McDaniels, if you know?

Mr. Hughes: That is No. 12.

Mr. Alsup: I stand corrected.

The Witness: Unfortunately they too overexpanded and as a result went bankrupt, stores disbanded and dispersed and bought up.

Mr. Alsup: Q. And you show Yor-Way as having the thirteenth largest share of the market in 1958 and you testified that it had made some acquisitions. Do you know what happened to Yor-Way?

A. Well, Yor-Way Markets unfortunately has the same similar history as both Fox Markets and McDaniels. To repeat, overexpansion, tried to get too much at one time and as a result went bankrupt and markets dispersed and bought up.

Q. You show Greater All-American having the twentieth largest share of the market in 1958 and you testified that Greater All-American had made some acquisitions in the past ten years. Do you know what happened to Greater All-American Markets?

[fol. 30] A. Yes. In the case of Greater All-American Markets I believe we showed in 1958 there were ten stores. Greater All-American, I believe, acquired some additional stores since that time and then retrenched. The exact numbers escape me.

Q. In response to a question by Mr. Hughes you testified that Acme Stores acquired the Alpha Beta chain. Do you know whether that was subsequent to the merger of Von's and Shopping Bag?

A. Yes, sir, I believe it was subsequent.

Q. Acme Stores is the nation's fourth largest chain?

A. Fourth largest chain.

Mr. Hughes: I object to your leading the witness.

The Witness: It is the fourth largest chain.

Mr. Alsop: Q. Do you have any knowledge as to whether the Department of Justice made any attack upon that acquisition of Alpha Beta by Acme Stores?

A. Made an attack?

Q. Yes. Challenged it in any way.

A. I believe it was questioned.

Mr. Alsop: Can we stipulate, Mr. Knight, that you were one of the persons who investigated that acquisition of Alpha Beta by Acme Stores and the decision was made by the Department of Justice not to attack that acquisition?

Mr. Knight: No, Mr. Alsop, we may not so stipulate.

Mr. Alsop: Q. You testified in response to questions by Mr. Hughes that Mayfair in your opinion had made some [fol. 31] acquisitions of stores in the past ten years. Do you recall that?

A. Yes.

Q. Do you have any knowledge as to whether or not Mayfair has sold stores in the same period?

A. They very definitely have. And their method of doing it has been to sell to employees, former managers, et cetera, putting them in business.

Q. Mr. King, Mr. Hughes asked you about any differences as between the Los Angeles metropolitan area and other metropolitan areas which you have studied and I ask you to refer to Page 4 of your affidavit and to the statement there: "Independents and smaller chains are competing

effectively and doing very well in Los Angeles, primarily because of their affiliation with strong co-operative buying organizations." I ask you whether you found strong co-operative buying organizations in other metropolitan areas which you have studied.

A. Yes. As a matter of fact the strong co-op and the strong voluntary, in my opinion and in the opinion of others who are authorities within the food field, and I think you will find that this is without opposition by anyone in the food industry, that the co-op and the voluntary not only have been the salvation of the independent but the guiding light of the independent. Strong co-ops and voluntaries exist throughout the nation in varying degrees. From West to [fol. 32] East it unfortunately becomes progressively weaker.

We have a saying in the food industry, Mr. Alsup, that the Midwest—this is in reference to the independent—that the Midwest is 20 years behind the West Coast. Hoboken is 20 years behind the Midwest and New York City across the river from Hoboken is 20 years behind Hoboken. So the greatest growth and the greatest strength of the independent, any way you want to view this independent grocery picture, it is strongest here in the West.

Mr. Hughes: I move to strike the answer and object to the question because it is irrelevant to this case and deals with matters outside of the Los Angeles metropolitan area.

Mr. Alsup: You have made your motion and your objection.

I might add that the question which I asked was directly responsive to a question which you put to the witness, Mr. Hughes.

Q. Mr. King, you testified that among your many clients listed in your affidavit in the grocery business are various food firms.

A. That's correct.

Q. Are your consultant to any gas companies?

A. Yes, I am.

Q. What gas companies?

A. Shell Oil Company.

Q. What service do you render to that company?

A. Well, the Shell Oil Company is undertaking as a [fol. 33] matter of policy—

Mr. Hughes: I object to this question, which is outside the scope of the case.

Mr. Alsup: Q. Complete your answer, Mr. King.

A. The Shell Oil Company feels that one of the ways to enhance the sale of gasoline and oil products is through the integration of gasoline and oil with certain kinds of food stores, basically the bantam type markets. And the Shell Oil Company will be in this type of an operation on a test basis very shortly and if the test is successful will expand this to other areas in the country.

Q. What role, if any, will you have in those markets?

A. We have been contracted to establish these stores, run them, staff them, manage them and affiliate them with the proper co-ops and voluntaries around the country because of our strong belief in their growth.

Q. What grocery items are planned to be sold in these bantam grocery stores?

A. Convenience items. Anything that would come under the term "convenience" we plan for our initial stores, some 3,000 to 3500 items and sizes of merchandise which will include such convenience items as milk and dairy products, as well as other grocery products. But we will also include a certain amount of prepackaged produce, frozen meat, ice cream. We expect to do a helluva job in ice cream.

Q. Dry groceries?

[fol. 34] A. Oh, yes.

Q. Bread?

A. Oh, yes.

Q. Packaged meat?

A. Unquestionably. Frozen.

Q. Have you read of other oil companies which have announced similar plans?

A. Yes. There are several.

Mr. Hughes: I object to the whole line of questioning.

Mr. Alsup: Q. I show you, Mr. King, an article from the Supermarket News dated October 22, 1962, and ask you if you have previously seen this article.

Mr. Alsup: I ask that it be marked as King Exhibit No. 2 for Identification.

Mr. Hughes: I object to the introduction of the article on the ground that it refers to other sections of the country and is not relevant to this case.

(The document referred to was marked by the notary public as King Exhibit No. 2 for Identification, and is attached hereto.)

The Witness: Your question was am I familiar with this?

Mr. Alsup: Q. Yes.

A. May I see also Page 1, please?

Q. Page 1 is there.

A. Yes, that's right. I have seen this article.

Q. Do you know whether this is a subject matter of [fol. 35] general interest to the food industry or not?

A. The food industry, I can categorically state, is waiting with bated breath for these occurrences to happen and they are really going to make a big impact in the industry.

Mr. Alsup: I offer the exhibit.

The Witness: As a matter of fact Louis Fox that is mentioned in this particular article there, I am well acquainted with him personally, as well as businesswise, who is head of Associated Grocers of Kansas City.

Mr. Alsup: Q. I show you an article, Mr. King, from the Supermarket News for October 15, 1962 bearing the heading "Hear 3 Major Oil Firms Ready Plans to Invade Field of Food Retailing." The first sentence of which states, "Supermarket operators may soon get added competition from a new and powerful source." I ask if you can identify this article.

Mr. Hughes: I object to the article as being irrelevant to the case.

The Witness: Yes. As a matter of fact I was interviewed by Supermarket News concerning this particular article.

Mr. Alsup: Q. This articles says, Mr. King, in one portion, "A Shell spokesman declined to comment on any specific moves." Can you tell us who the Shell spokesman was, if you know?

A. Yes, sir, I do. That happened to be me.

Mr. Alsup: I ask that this article be marked King No. 3

[fol. 36] (The document referred to was marked by the notary public as King Exhibit No. 3 for Identification, and is attached hereto.)

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Mr. Alsup: Q. I show your another article, Mr. King, from Supermarket News for Monday, May 6, 1963, and ask if you can identify that article.

A. By the way, I would just like to add this for the record on that last exhibit, referring to "Hear 3 Major Oil Firms—"

Q. That is Exhibit 3.

A. That is the one I am talking about. Where the Shell spokesman refused comment. I did this, of course, after conferring with my client. I refused comment. I would just like to add that.

Mr. Hughes: I object to the introduction of this exhibit on the ground that it is irrelevant to the case and outside the metropolitan area.

The Witness: Do you want me to answer this?

Mr. Alsup: Q. Yes. Can you identify it?

A. Oh, yes, I can identify it. I saw it.

Q. Are these matters common knowledge or not in the food industry?

A. Supermarket News is the best read publication in the food industry. Therefore the movements by these various gas companies into the food field of course is common knowledge.

[fol. 37] Q. Based on your years of experience in the food industry, Mr. King, do you have any opinion as to whether or not successful innovations in the grocery business in one way are adopted in other areas of the country?

A. Well, you could almost state categorically, Mr. Alsup, that innovations, if they are successful anywhere in the country, or for that matter on the North American Continent, and that would include the North Pole, and show efficiency and show volume and show sales and show profits, that they are of interest to market operators anywhere else in the country or anywhere else on the continent, because the whole business of our food industry is efficient operation.

Mr. Alsup: I ask this be marked King No. 4.

(The document referred to was marked by the notary public as King Exhibit No. 4 for Identification, and is attached hereto.)

Mr. Alsup: Q. Mr. King, have you noticed any other changes and innovations occurring in the food industry, speaking of the retail end, in recent years?

Mr. Hughes: I object to the question as being vague.

Mr. Alsup: Q. Specifically do you have any knowledge about discount house operations?

A. Oh, yes.

Mr. Hughes: I object to the question as being leading.

The Witness: Do I have any knowledge of discounting?

Mr. Alsup: Q. Yes. Whether or not discount houses are [fol. 38] or are not moving into the supermarket end.

A. By leaps, bounds and giant steps.

Q. Have you noticed any chains—

A. May I just add something else?

Q. Yes, please.

A. Not only they are going in by leaps and bounds into the food industry, the discount house that is one side, that is the giant discount, and on the other coming in like the hordes out of China, the Tartars, is the invasion of the bantam store and the convenience market. This is a trend that is also sweeping the country. And no section of the country is going to be immune from this.

Q. Have you noticed any change in the type of items being sold in liquor stores generally?

Mr. Hughes: Where are we speaking of now?

Mr. Alsup: Based on his experience any place.

The Witness: Mr. Alsup, with due respect I would have to confine that answer that in the case of liquor stores you have controls that are not normally there in the case of other types of retail outlets. Liquor stores are generally controlled in their operation and in their merchandise as well as their merchandising methods by the various State liquor control boards and Alcoholic Beverage Control Boards that exist around the country. It would be very difficult for me to make a statement concerning liquor stores not being aware of all the rules and regulations that [fol. 39] concern that kind of a product from the standpoint of government regulations.

Q. Mr. King, in response to questions by Mr. Hughes you testified that any independent can outcompete any

chain on items such as produce and meat which are not carried by Certified Grocers or Orange Empire. Would you state the basis for that conclusion?

A. Well, as any good operator in the country can tell you, the prime profit in both produce and meat is operational. In other words— You see, meat discounts generally speaking in the industry are so slight as to be negligible anyway, you know, in terms of the volume that a single store would buy or even a group of stores or a chain or anything else. This isn't where the profit is made, on the buying. It isn't even made so much on the selling. It is made on the cutting in the case of meat. This is an operational problem. This is a problem of inefficiency. That is No. 1.

The chain store cutter of meat cannot be classed in the same category as the independent who watches his meat operation. The independent is as much concerned with the quality and the operational efficiency of his meat department and produce department as he is in the realm of customer handling.

The independent has a chance here to outmerchandise the chain because by and large this is one of the big things, quality meats. Quality meats at really good competitive prices, because he knows how to cut, this is the bane of [fol. 40] existence of the chains in general and that is the reason for so damn meat clinics all over the country run by various organizations, such as Supermark Institute and National Association of Food Chains and others, who do nothing but try to hold classes for regional operators to make them more efficient.

The same thing holds true in produce, the control of waste and the control of quality. This is where the profits are made operationally. And the independent who sits on top of his operation is in far better position to control these costs than the mammoth chain operator. And he can outmerchandise him producewise and meatwise.

This is the story across the country.

Mr. Alsop: No further questions.

Redirect examination.

By Mr. Hughes:

Q. Mr. King, do you know when this merger occurred between Von's and Shopping Bag?

A. The exact date?

Q. Yes, sir.

A. No, I don't

Q. Do you know approximately?

A. Yes. I believe it was in 1960, I think.

Mr. Alsup: I will stipulate with you as to the date, if [fol. 41] you want it, Mr. Hughes.

Mr. Hughes: Q. Do you know what the sales of Von's Grocery Company were in 1958, the year of your survey?

A. Yes. It is so stated on Page 35 of this article.

Q. Mr. King, have you received a fee for testifying for the defendants in this case?

A. Have I received a fee?

Q. Are you working on a fee basis?

A. Yes, I am.

Q. Will you tell us what your fee is?

A. Gee, you know, I will tell you but this is going to strike you awfully funny. I have no idea but it's true. I haven't decided.

Q. Do you know how many stores Von's-Shopping Bag has today?

A. In total? The exact number, no.

Q. Approximately?

A. I wouldn't want to venture a guess. You know, I will tell you about these store buildings, they change from week to week.

Q. Do you know how many stores Safeway has in the Los Angeles area today?

A. Today? No. All of these figures, by the way, are readily available.

Q. Do you know how many stores Ralphs has in this area today?

[fol. 42] A. I wouldn't give an answer to the exact number of stores or an approximate number of stores at this minute if my life depended on it without recourse to the proper sources.

Q. You wouldn't know in the Thriftmart?

A. It isn't I don't know. I know where to get the information but I haven't got it available at this moment. I would be very happy to supply this information at any time. I haven't got it available right now. This is no secret.

Mr. Hughes: I have no further questions.

Recross-examination.

By Mr. Alsup:

Q. Mr. King, you testified that you will be paid a fee for your services in this case.

A. That's right.

Q. Prior to the time that you left Food Topics had you expected to be a witness in this case?

A. Prior to the time? Yes, I did.

Q. Did you at that time state that you would testify without any fee and without any charge for your services?

A. That is correct. At the time, while I was employed by Food Topics, it was agreed by me and so stated, I believe in a letter to Mr. Von der Ahe, or to yourself, I don't recall which, that I would be most happy to testify at no charge for my services since I was employed by the magazine.

[fol. 43] Q. Thereafter, since you went into business for yourself, you felt that if your time was to be taken up you necessarily had to be compensated; isn't that correct?

A. That is absolutely correct, Mr. Alsup. This is what we sell, is time.

Mr. Alsup: No further questions. Mr. Hughes: That is all.

(Discussion off the record.)

Mr. Alsup: Mr. King, if it is agreeable to counsel for the government and counsel for the defendant that this deposition be filed without your signature, but be deemed to have been signed by you, would you be willing to waive signature?

The Witness: I certainly would.

Mr. Hughes: So stipulated.

Mr. Alsup: So stipulated.

—— ——— Signature of the Witness.

Subscribed and sworn to before me this — day of —, 1963

— — Notary Public, in and for the County of Los Angeles, State of California.

[fol. 44] STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, HAROLD M. LEIBOVITZ, C. S. R., a Notary Public within and for the County of Los Angeles and State of California, do hereby certify;

That prior to being examined, ROY M. KING, the witness named in the foregoing deposition, was by me duly sworn to testify the truth, the whole truth and nothing but the truth;

That said deposition was taken before me pursuant to oral stipulation, at the time and place therein set forth, and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision; that the said deposition is a true record of the testimony given by the witness;

That it was stipulated by counsel that said deposition may be read, corrected and signed by the witness before any notary public in and for the County of Los Angeles, State of California.

I further certify that I am neither counsel for nor related to any party to said action, nor in anywise interested in the outcome thereof.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal, this 4th day of June 1963

Harold M. Leibovitz, Notary Public in and for the County of Los Angeles, State of California.

[fol. 45] STATE OF CALIFORNIA,
County of Los Angeles, ss:

I, HAROLD M. LEIBOVITZ, a Notary Public within and for the County of Los Angeles and State of California, do hereby certify:

That prior to being examined the witness named in the foregoing deposition, ROY M. KING, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth; that the said deposition was taken down by me in

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shorthand at the time and place therein named, and thereafter reduced to typewriting under my direction.

I further certify that it was stipulated by and between counsel, with the consent of the witness, that the signature of the witness to the said deposition be waived, and that it shall possess the same force and effect as though read and signed by the said witness.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 4th day of June, 1963.

Harold M. Leibovitz, Notary Public in and for the
County of Los Angeles, State of California.



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City of the Future

The City of the Future is a vision of a world where technology and nature are in perfect harmony. It is a place where the boundaries between the physical and the digital are blurred, where the possibilities are endless. The City of the Future is a place where the best of both worlds are combined, where the future is not just a dream, but a reality. It is a place where the future is now, and the future is always with us.

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Population Rise, Industry Boom Spark L.A. Area
(Continued from preceding page)

their promotional program. The biggest of these are Fox Markets, McDaniel's Markets, and Yor-Way.

Now, in an unprecedented move, eight chains have announced that they will introduce Blue Chip Stamps on Jan. 4, 1960. According to Albert Watson, Market Basket executive and president of Blue Chip Stamps, the following chains will add stamps: Safeway, Ralphs, Von's, Market Basket, Thriftmart, Shopping Bag, Alexander's, and Lucky.

Reaction of individual operators to this blanketing of the area with stamps was mixed. One merchandiser said, "We'll all have stamps and no one will have the edge."

An operator of an eight-unit chain lamented the spread of stamps.

"Cost of the stamp program will be at least 1.6%," he said. "This will push up the cost of groceries from 1.5% to 2%."

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KING EXHIBIT No. 2

Supermarket News, October 22, 1962

Midwest Oil Firm Tests Food Sales

KANSAS CITY, Mo.—Amid further reports of oil company interest in the retail food field, it was learned last week that a Midwest oil firm has been conducting food sales tests in several gas stations for the past three years.

Associated Grocers, Kansas

See Midwest, Page 22

Midwest Oil Firm Tests Food Sales
Continued from Page One

City, Mo., which is supplying two of the stores, has, in addition, been approached by another large oil company, but has no plans to test any other food-service station combinations, according to Louis Fox, AG general manager. He declined to name the firm.

At the same time, there were strong reports last week that another major firm, Standard Oil Co. of Indiana, was seriously considering entering the food field. The firm could not be reached for comment. Other producers said to be preparing to sell food are Standard Oil Co. of New Jersey, Socony Mobil Oil Co. and Shell Oil Co.

The Kansas City experiment was termed "not very successful" by George Dewell, director of retail operations for Associated Grocers. Of the three food operations supplied by the retailer-owned cooperative in the test, only two remain in existence. However, another test store, in Home, Kan., was termed "satisfactory" by an oil company official. It is serviced by Consolidated Foods, out of Manhattan, Kan., he said.

AG set up food operations in three service stations: One located in Raytown, a suburb here, operated by Imperial Central State Oil Co., St. Joseph, Mo.; one in Fulton, about 150 miles from here, and a third in Moberly, about 140 miles from here, both operated by North Missouri Oil Co., Clayton, Mo., a St. Louis suburb.

Both Imperial Central States and North Missouri Oil

are subsidiaries of Imperial Refineries Corp., which also has its headquarters in Clayton, and operates in about 13 Midwest and Southern States.

The Raytown unit closed about a year ago, when Imperial sold the station. Mr. Dewell attributed the failure of the food operation to the same reasons that have kept bantam and superettes from flourishing in this area: The great number of larger, conventional supermarkets and their long hours, taking the edge off convenience type markets.

The two units still in operation in Fulton and Moberly have been doing a weekly food volume in the range of about \$3,000-\$5,000 retail, Mr. Dewell said, but recently their volumes have been slipping, with additional supermarket competition coming into their areas.

The food sections adjoin the offices of the service stations within the same structure, a checkstand acting as a partition, Mr. Dewell noted. About 1,000-1,200 square feet are devoted to food at each location. Shelving and frozen food cases are arranged for self-service.

Contacted in St. Joseph, Lloyd Dowden, district manager Imperial States, noted that the firm's food and gasoline combination in Home, Kan., has a separate building for the food store, while the gasoline station office is set on the pump island. The food store has about 1,200 square feet, and carries a "complete line of foods, except for fresh meats," he said.

Non-foods include health and beauty aids, and various impulse items, such as ammunition and some soft goods. The store has one check stand, and the layout is as in a conventional supermarket, but on a smaller scale, he noted.

The store tries to post supermarket prices whenever possible, he said, but sometimes a higher markup must be used. The store maintains the same hours as the gas station, from 6 a.m. to 10 p.m., seven days a week.

Mr. Dowden said the operation has attracted more gasoline volume and food volume has been running in the range of \$3,000-\$5,000 a week.

Imperial Refineries has about 10 food and gas combinations throughout its entire operations.

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KING EXHIBIT No. 3

Supermarket News, October 15, 1962

Hear 3 Major Oil Firms Readying Plans to Invade Field
of Food Retailing

By Steve Weinstein

NEW YORK.—Supermarket operators may soon get added competition from a new and powerful source. At least three major oil companies are in the process of moving into the retail food business, Supermarket News learned at the weekend.

Socony Mobil Oil Co. and Shell Oil Co. Standard and Socony could not be reached for comment. A Shell spokesman declined to comment on any specific moves.

He did say, in general terms, that the firm presently has many service stations adjacent to bantam food stores and supermarkets and has been studying the relationship of the two fields for some time.

The gasoline field, he pointed out is very competitive, and every company is seeking ways to improve its position.

It was not clear exactly what form the new food markets would take, and it is probable that each firm will end up with different operations, assumedly either franchised to current operators of gas stations or to food operators.

At least one of the firms plans

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to erect bantam markets, adjacent to its stations, it was learned. However, it is understood that another Socony, already has experimented with bantam stores and rejected the idea.

Instead it is planning to rearrange its stations, moving the pumps behind them, and selling about 100 food items in case lots.

Basically, it was understood that the oil company plans have progressed beyond the stage of merely studying

possibilities. The firms have talked with food consultants and grocery manufacturers, and are now considering selection of merchandise and fixtures.

Trade observers called an invasion of the food field a natural move for the oil companies. It would provide plus volume from customers already in the service stations at little added cost. Tray packs probably would be used heavily.

Many service stations, of course, already sell food in limited ways, mostly through vending machines. And in the early days of the automobile, the same establishments frequently sold both food and gasoline.

The reverse also is true. Supermarkets today are in the service station business to a limited extent. A number of firms now operate stations. The most prominent chain in the field is Food Fair, which in addition to service stations also operates tire and auto accessory centers.

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KING EXHIBIT No. 4

Supermarket News, May 6, 1963

Food-Gas and Vice-Versa Movement Seen Spreading

By Steve Weinstein

NEW YORK.—Supermarket firms and oil companies continue to show a strong interest in each other's operations. All signs point to an increase in the next few months in the number of supermarkets selling gas and gas stations offering food.

The most recent move by supermarkets along these lines was made by Supermarkets Operating Co., 19-unit chain member of the New Jersey Shop-Rite cooperative.

SOC is testing a gas station across from one of its Shop-Rite supermarkets in Cranford, N. J. The station offers private label oil and gas, and plans include introduction of Shop-Rite tires and other auto accessories.

If the test is successful, SOC will open additional stations, with three to five more contemplated in the near future.

Meanwhile in Spokane, Wash., Buy-Well Foods is operating a service station leased from Richfield Oil Co. The station is 30 feet from a Buy-Well Food Store and, tie-in promotions are run linking the station to the unit as well as to the firm's three other supermarkets.

A number of other supermarket firms also are in the gas station business. Probably the most prominent is Food Fair, which also operates tire and accessory centers.

Mank service stations, of course, have been in the food business for years, but this generally has consisted of selling a limited line of groceries, often in or near small towns. The practice was even more pronounced in the early days of the automobile.

The modern trend to service station expansion into new fields has moved in three directions: 1. Vending machines, probably the most prevalent at present; 2. gift shops and restaurants, and 3. superettes.

The latest move was made late last month by Humble Oil & Refining Co., New York, chief domestic affiliate of Standard Oil Co. (New Jersey).

Humble, in its Eastern region, signed a contract with Frank G. Shattuck Co., New York, operator of Schrafft's foods and restaurants.

The contract calls for a food service center to serve vended frozen foods which can be heated in seconds in electronic ovens.

The center will be built by Esso and operated by Schrafft's. It will be in a separate building at an Esso travel center south of Baltimore on Maryland Route 3.

The building is designed to seat 60 persons, with additional seating capacity during the summer on a terrace fitted with outdoor furniture.

The accent will be on vending, but a staff also will be on hand to make sandwiches and salads. The restaurant will be open 24 hours a day, seven days a week.

In a somewhat similar move in March, American Oil Co., subsidiary of Standard Oil Co. of Indiana, opened its first American Way gift shop and restaurant near Albion, Mich. The facility, on the site of a Standard station, is operated in conjunction with Food Facilities, Inc., Harvey, Ill.

The shop is to be the first of a chain. In addition to a 24-hour snack shop and dining room, it will sell cookware, wall accessories and other gift items. The firm also is testing food vending and is said to be considering entering the food field on a more direct basis.

Meanwhile Stouffer Foods Corp., Cleveland, is increasing its frozen food volume through self service heat-and-eat operations at service stations in Michigan, New York, Kentucky and Ohio. The food is in plasticized casseroles or throw-away plates with transparent covers.

Future moves by oil companies may involve supermarkets even more directly. There are strong but unconfirmed reports that a number of firms are readying tests of take-home food sales. Mentioned as possibilities are such companies as Shell Oil and Socony Mobil Oil Co.

Other firms already are in the filed.

Imperial Refineries Corp., Clayton, Mo., operates about 10 food and gas station combinations in its 13-State Midwest and Southern operating area.

Two of the gas station stores are supplied by Associated Grocers of Kansas City. One is in Fulton and one in

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Moberly, Mo.; both stations are operated by Imperial subsidiaries. A third combined operation is in Home, Kan.

In Dallas, Humble Oil leases space adjacent to a station to an independent superette operator.

It is thought that the future sale of food by oil companies could take several paths. One is the bantam market approach. The other, said to be under consideration by one large firm, involves selling about 100 basic food items in case lots.

[fol. 2294] IN UNITED STATES DISTRICT COURT

Transcript of Proceedings—June 14, 1963

The Court: They have it over here, I guess.

Mr. Alsup: I might say, your Honor, if I may, in all of these depositions, as a natural course there is a lot of hearsay testimony, as is bound to be in any deposition. That is one of the reasons I didn't object to hearsay in court the other day. It seems to me that both of us have elicited in depositions and the over-all picture has not changed, and we felt it would consume the time of the court to make specific objections.

The Court: Well, counsel, there are two types of cases that thrive on hearsay, a patent case and an antitrust case. They thrive on hearsay.

Mr. Alsup: I don't know about patent cases, and very little about the antitrust. But I know that that is very true there.

The Court: I think on one occasion Mr. Thurmond Arnold was arguing a case in the Supreme Court, and after he had traveled all over the land outside of the record for about forty minutes, the chief justice asked him a question and he said, "If I had to answer that I would have to go outside the record, your Honor."

Go ahead, counsel.

Mr. Coyle: Your Honor please, may we call Dr. William Brown as our next witness.

[fol. 2295] WILLIAM F. BROWN, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

The Clerk: What is your name, please?

The Witness: William F. Brown.

Direct Examination.

By Mr. Coyle:

Q. Dr. Brown, would you state your residence address for the record?

A. 14018 Otsego, Sherman Oaks.

Q. Dr. Brown, what is your occupation?

A. I am a professor at the University of California.

Q. And would you state for the record your academic background?

A. I received my Bachelor's and Master's degrees in economics at UCLA in 1933 and 1934. And then went to Northwestern University and received my doctorate several years later.

I then returned to teaching at the University, UCLA, and have been in teaching and research since that time.

Q. Have you done any market research, other than work as a professor in teaching?

A. Well, beginning with my doctoral dissertation, which was concerned with market research and retailing, I have, [fol. 2296] I suppose for the last 23 years been primarily engaged in—or very frequently engaged in one or another type of market research projects.

The first study I worked on, this doctoral dissertation had to do with the measurement, from the consumer point of view, of shopping patterns—in the Los Angeles area, I might add.

Q. Were you engaged by the Government to undertake a study in connection with this case?

A. I was.

Q. What was the nature of that study?

A. Well, there were two aspects. One was to indicate the factors delimiting the market area for the retail grocery market in this general area—that is, in Southern California.

And the second aspect was to deal with the nature, the geographical nature, one might say, of competition within the markets so delimited.

Q. And did you—

A. I might say that these studies were based primarily, to be based primarily upon the material available in census reports and in the material available from the managers' answers to the interrogatories.

Q. Can you describe how you undertook the first part of the study?

[fol. 2297] A. Yes. I simply used the data available from the 1960, preliminary data available from the 1960 census of population, and with certain topographic maps, I had that were plotted by a cartographer in the geography department on maps.

I think that problem has been stipulated.

Q. Do you have a copy of Government's Exhibit 83 for identification?

The Clerk: You have the original. Do you want me to give it to him?

The Court: He can have this if he wants.

The Clerk: This is the original one.

Mr. Vaughn: May I inquire if you have another copy? We don't have a copy of that.

The Court: Here, use mine, counsel.

Mr. Vaughn: Thank you.

(The exhibit was placed before the witness.)

By Mr. Coyle:

Q. Dr. Brown, can you describe what this exhibit shows?

A. It shows simply that in the relevant area, that is Southern California, there is a high concentration of population in what might be termed the coastal plane, primarily the southern part of Los Angeles County and the northwestern part of Orange County, what is usually termed the [fol. 2298] metropolitan district.

Q. Does this exhibit relate the population density to the topography?

A. Yes, it shows the fact that the mountains in the region tend to act as barriers to the expansion of population.

Q. Now, referring to the second part—

The Court: You say that—if I understand you, that those mountains in 83, are those the mountains, the Sierra Madre mountains, or what mountains are they?

The Witness: Sierra Madre, the San Gabriel in general on the northern part, the Hollywood Hills along the coast and on the west, and then the range in Orange County to the south.

The Court: Well, they are scraping those off awfully fast, Doctor.

The Witness: Well, I think that still there is not much concentration of population in the mountains—

The Court: You mean at the present time. I understood you to say it was a bar to the explosion of the population in that direction. Of course, you can't stop explosion, that we can see, until we change some of our fundamental beliefs—but the thing I am talking about is the movement of the population, you are saying in effect that those mountains [fol. 2299] are a bar to the movement of the population.

The Witness: I should correct myself and say that they have been so far a considerable bar to that movement. It is certainly changing.

By Mr. Coyle:

Q. Now, Doctor, referring to the second part of your study and referring to Government's 84 for identification, what does this exhibit show?

A. This exhibit simply indicates the location—first you want the underpart?

Q. Refer to the underpart first.

A. Yes. It simply shows the locatioo of Von's or Shopping Bag stores, and the related location of all those competitors which were listed by the managers of Von's or Shopping Bag stores in the answer to the interrogatory.

Q. And what does the overlay show, Doctor?

A. The overlay shows simply the stores of other chains which were located within a two-mile radius of the competitors named by the Von's and Shopping Bag managers.

The Court: Are all these distances approximately two miles between these numbers?

The Witness: Two or less.

The Court: Two or less.

Mr. Coyle: And what is the purport of the entire exhibit, [fol. 2300] Dr. Brown?

The Witness: Simply that there is a sort of interlock in the competitive retail grocery market. One unit competes with another, which competes with another, and that this has a sort of a transmittal effect often in competition.

The Court: What do you mean by "transmittal effect"?

The Witness: That if one competitor adopts a practice or a policy which has certain advantages to him, and significant—I don't like the word—important disadvantages to a nearby competitor, that competitor, the second one, may feel forced to meet the first competitor by adopting the same policy.

The Court: In other words, like a communicable disease, it just spreads, is that what you are saying?

The Witness: Exactly.

By Mr. Coyle:

Q. Does the fact that the chains in the area generally follow identical prices, that is one chain will have identical prices throughout all its stores, does that play a part in this interlocking competition?

Mr. Vaughn: Object, your Honor, no proper foundation for what all the chains do.

Mr. Coyle: I think it has been developed in the record [fol. 2301] ord.

The Court: What is that?

Mr. Coyle: I think it has been developed in the record, that the chains utilize the same prices in all their stores.

Mr. Alsup: Yes, it has been stipulated, your Honor, in that regard that because of the California Unfair Practices Act a chain doesn't normally sell at a lesser price at one store than it does at other stores.

The Court: You mean that is illegal, for a chain to sell at a different price in different stores?

Mr. Alsup: No, your Honor. Under the California Unfair Practices Act, however, if a chain should reduce its price in one particular store and maintain it in another, and the complaining party could show that that was done for the purpose of injuring him as a competitor—

The Court: Well, you are talking now about civil liability, aren't you, really?

Mr. Alsup: Oh, yes, that's right, your Honor.

The Court: It would have to be shown that it was done for the purpose of depriving him of his competitive status in that area, is that right?

Mr. Alsup: That is right, and of course, your Honor, I think as Mr. Von der Ahe testified generally the chains, a chain like Von's will have the same prices in all of its [fol. 2302] stores, for the most part. It doesn't—

The Court: Doctor, in your research what have you found? Have you found generally that the prices are the same, or they are not the same, or have you found it out at all?

The Witness: In the separate units of the same chain?

The Court: Yes.

The Witness: I have not researched that topic scientifically.

The Court: You just assumed, I take it?

The Witness: Well, from one fact, that is, I have drawn the conclusion that since these chains advertise prices in their store-wide—city-wide advertising, that one would expect that in general their units would observe these prices as advertised.

The Court: I think that is probably a reasonable assumption. Upon that basis I will allow the testimony, his opinion.

By Mr. Coyle:

Q. Doctor, does that play a part in this exhibit?

A. No, I don't think that has been a significant factor in deciding upon setting this opinion up.

This opinion simply shows that as a matter of fact if the chains departed from this sort of policy, to any very great [fol. 2303] extent, in an important way, that inevitably this would be transmitted through the metropolitan area.

Q. Dr. Brown, on the basis of your study and your general experience, can you draw any conclusion as to the geographical nature of competition in the Los Angeles metropolitan area?

A. Yes, I think I can.

Q. What are those conclusions, Dr. Brown?

A. In the first place, competition is extremely complex and it takes place at many different levels.

In the first place, the so-called firing line level, which we talked about. The chain, the store unit, the store unit competition.

There is also the other extreme, the over-all chain competition. That is chain units against chain units. I think Mr. Von der Ahe's statement the other day—or yesterday indicated this sort of competition when he stated that his firm reduced the general shelf prices and discontinued the practice of extreme loss leaders. This policy, which I think was probably a very good one, was adopted by other chains in the area.

This in itself indicates, I think, that when a major policy is adopted by one chain, it must be recognized and adopted—not necessarily adopted, but recognized and considered by others, and often adopted.

[fol. 2304] There are other kinds of competition within the area, not only the unit-to-unit competition or competition at the top, but also the transmitted competition, which may or may not be very significant in particular instances.

For example, there are a few Shopping Bag stores which are so located that they do not, according to the store managers, compete directly with a Von's chain. They compete with the same—with a same store in sort of an interlock arrangement. I don't think this is very significant.

On the other hand, it indicates again the complexity of the kinds of competition which can occur in the market. And the action by one unit in this group of three stores might inevitably result in reactions by the others. I should not use the word "inevitable." It might result.

[fol. 2305] Q. Dr. Brown, are you familiar with the methods used by Dorothy Corey, Dr. Dorothy Corey, in making her various studies that have been introduced into evidence here?

Mr. Vaughn: I don't think she is a doctor.

Mr. Coyle: I am sorry.

The Court: I don't mean to belittle your title, but "Doctor" doesn't necessarily mean anything, but only the person who speaks it means anything. Do you agree?

The Witness: Yes.

The Court: The man is as big as the title.

By Mr. Coyle:

Q. Are you familiar with Mrs. Corey's studies?

A. Yes.

Q. What is your opinion as to them?

A. In general I would agree with the over-all statements about—not the over-all statements, pardon me—I would agree with the facts that she has emphasized in terms of the results that she has found in individual cases. I would quibble a little about her statistical sampling technique, but I don't think this would do any more than cause a little disagreement about percentages, which I think is unimportant here——

The Court: Isn't any sampling technique open to criticism in some phases?

The Witness: Yes; but some are worse than others by [fol. 2306] a great deal.

The Court: It is a matter of degree is what you mean to say; is that right?

The Witness: Exactly.

In her case, in that particular case she used what is sometimes called a modified haphazard sampling technique, and I think I could quarrel a little with this, but I think my conclusions as to error would be very small, in terms of what she found with respect to the shopping patterns of the people involved. It is what she didn't state about them that I have some quarrel about.

By Mr. Coyle:

Q. What is this, Doctor?

A. Primarily two things. One, she used, in her questioning, the words "most" and then "next most." In my experience I have found that a significant number, a large number, as a matter of fact, of consumers, tend to shop not just one store, or two, but often three or four. They may do most of their shopping at one store, but they compare the offerings of a good many other stores, and given enough of an advantage at the other store they will go there.

I think your Honor understood this very clearly and stated it very clearly in talking about the Beverly Hills housewife who would go clear to the valley for cheese, for example.

[fol. 2307] The Court: Well, Doctor, I take it what you mean to say is, simply, that a customer may from day to day trade with a store, an independent or a chain store, but when she gets ready to go down, maybe, and buy a substantial amount of merchandise all at one time, she may go to an entirely different store; is that right?

The Witness: This is one very important aspect of the problem. It is not the only one, I think. There are some customers who will regularly check the specials, for example, of a number of stores, and then go from one to another picking up the specials, regardless of the cost in time and effort. I think Mr. Von der Ahe can check me on this, but I think the trade calls those people "cherry pickers," if I am not mistaken.

There are others who will shop at one store at one time and then move to another at a different time.

In this connection I might also say that while I agree with Mr. Von der Ahe's statement that perhaps the most important factor about store trade is convenience, there are two aspects to convenience. One, it may and is often interpreted to mean only nearness of the home to the store; and I think very often convenience can mean a lot of other things, too, such as the normal pattern of travel of a consumer. For example, there are a number of gasoline stations near my home, but since I normally go into Westwood [fol. 2308] to work I buy my gasoline generally in Westwood, because it is more convenient, although it is ten miles away from my home. And this is not too unusual in grocery shopping patterns. I say "too unusual"; I mean 10, 15 or 20 per cent of the customers of a particular store may fall into this bracket.

It helps to explain the peculiar situation, I think, in some of the defendant's exhibits in which—or Mrs. Corey's situation—in which a consumer who lives right next to one Von's store actually shops, says she does most of her shopping at a different Von's store.

Mr. Coyle: I have no more questions, your Honor.

Cross-examination.

By Mr. Vaughn:

Q. Professor Brown, when did you receive your doctoral degree?

A. 1941.

Q. Did you say that your doctoral dissertation, if I am using the correct word, sir, was concerning shopping habits in the Los Angeles metropolitan area?

A. No. I said that as part of the dissertation I did some research on shopping patterns in the Los Angeles area.

Q. Shopping patterns in any particular type of store?

A. Well, I used two different situations. I used the Sears-Roebuck stores, and I used certain grocery stores [fol. 2309] only, a limited sample, Ralph's Grocery Store in Santa Monica, and in Westwood, and the Safeway Stores. There I found that there was what I called at that time a good deal, again 10 to 20 per cent, of cross-traffic or cross-travel, a man who lived near the Glendale Sears would actually be found shopping in the Olympic Sears or the Pico Sears; and the same thing occurred in connection with the Ralph's stores.

Q. You say you live in Sherman Oaks, is that correct?

A. Yes.

Q. Can you tell me what intersection you live closest to, main intersection?

A. Riverside Drive and Woodman.

Q. Are you married, sir?

A. Yes.

Mr. Coyle: If your Honor please, I think this is outside of the scope of direct.

The Court: I don't think whether he is married or unmarried would influence me.

Mr. Vaughn: I agree with that. I was merely going to ask him about his shopping habits.

The Court: I see. All right.

I thought we were going over on another tour of some kind.

By Mr. Vaughn:

Q. I just wanted to know whether you or your wife do [fol. 2310] most of the grocery shopping in your family.

A. I think my wife does most of it.

Q. You do some of it?

A. I do some of it.

The Court: Let me ask him a question, counsel.

Do you pay any attention to prices when you shop?

The Witness: Yes, I do.

The Court: Just to what degree? When you walk into a grocery store to purchase, if you want to buy some canned deviled ham, do you really pay any attention to it?

The Witness: Yes, I do. I think I may be a little extreme, because of my interest—

The Court: How do you know what the price should be?

The Witness: Canned deviled ham, it is a question really of whether the price is too high for the product, regardless of the competition. In other words, if it is a dollar and a half, for example, and I think it is too much, I can't afford it.

The Court: It will run about 22, 23, 24, 25 cents, I imagine, for a small can, that would be my guess. If you walked into a store and it would be two cents above that price, would you pay any attention to the price?

The Witness: No.

The Court: You would pick up the number of cans you [fol. 2311] wanted and that would be it?

The Witness: I think so. In that one case.

The Court: All right. But, Doctor, if you are going to shop and you like a particular store, unless there is something that calls your attention to an extravagant overcharge, are you really going to pay much attention to the price? Isn't it the condition of the store, the way the personnel treats you, the talking conditions, and all the things, that really invites you to that store?

The Witness: No; I think I would be influenced by price. In fact, I know I am, because I do consider on major items the price aspect. I would not go to a store which I felt did not have, in general, shelf prices that were competitive. For example, rightly or wrongly—

The Court: Let me interrupt you. As a matter of fact, don't you know that today in Los Angeles practically all stores are competitive on shelf prices?

The Witness: This may be true across the board, as an average—

The Court: That's what I mean, across the board.

The Witness: But that doesn't mean that in individual cases they are. Nor does not mean that there may not be some stores, some chains—my impression, for example, is that Fox before its change of ownership, bankruptcy, my

impression of Fox Stores was that it seemed to be some-
[fol. 2312] what higher-priced across the board than other
chains in the area. Mr. Von der Ahe perhaps can correct me
on that point. I don't know.

The Court: Go ahead.

The Witness: This is an impression that I have, and
from my interviewing of consumers I know that consumers
very often do get these impressions. Again, rightly or
wrongly.

The Court: But, Doctor, I am not talking about a Jergen-
son store. Are you acquainted with Jergenson?

The Witness: Yes.

The Court: They are higher in price, I take it, because
they claim to be a premium store.

The Witness: And they give credit.

The Court: And credit and delivery and things of that
kind. A great many people go there for those reasons and
their prices, I assume, are higher. But, generally speaking,
take an area like Beverly Hills, wouldn't you expect to find
the shelf prices pretty much the same at Safeway, Ralph's,
or whatever store you go to?

The Witness: I wouldn't expect to find them the same. I
would expect to find the average about the same.

Perhaps I could answer this by saying I have done some
research on the problem in the Westwood area——

The Court: That's good enough. Let's use that.

[fol. 2313] The Witness: (Continuing) —and I found
that if one took the leading chains, excepting the Villa Mart
and Jergenson's, and we could use as an average of all
prices on a typical market basket——

The Court: Excluding loss-leaders.

The Witness: (Continuing) —excluding loss-leaders, this
was a market basket, and we used an average of 100 per
cent, or an index of 100 to indicate the average on each
item, that the average for the chains would be in the 85 to
90 index, and Villa Mart would be 110, and Jergenson's 125,
perhaps, but that on individual items in the market basket
that there might be as much as a 20 per cent variation be-
tween stores.

The reason for this, I think——

The Court: Is that in hard groceries or produce?

The Witness: The canned goods, primarily; eggs of a

given grade, for instance; and there was one item of produce, I think, in there, apples, which is a fairly standard item, not completely so. But this is a market basket.

The Court: Did you attribute this to a competitive situation, or the human equation, that one store manager doesn't know what is going on in the other area?

The Witness: I think the human equation. I think the stores try to stay as close to competitors as they can, but they have thousands of items to price, and this is an extremely difficult thing to keep perfectly aligned.

The Court: Would you say on advertised items the shelf prices run about the same?

The Witness: A great many of the advertised items are specials.

The Court: Let's leave out the loss-leaders. I am talking about the general advertising listing prices. I guess most of those are leaders, though, aren't they?

The Witness: Most of them are. They are the advertising allowance items, which sometimes are quite numerous.

The Court: You and I talk as if we have been in the grocery business, and I was wondering. You have had no experience in the grocery business, have you?

The Witness: No. I have had some experience in retailing.

The Court: Were you a clerk in the store?

The Witness: Yes.

The Court: What kind of store?

The Witness: Department store.

The Court: What kind of merchandise?

The Witness: Well, at that time it was in men's wear.

The Court: You never got into women's wear?

The Witness: Never got into women's wear.

The Court: Go ahead.

[fol. 2315] By Mr. Vaughn:

Q. Professor Brown, let me ask you something about the survey to which you were just referring in the Westwood area. Did you check Market Basket's price on the same day that you checked the competition?

Mr. Coyle: If your Honor please, I think maybe the record should be clarified. I think the doctor was referring

to a market basket being a basket of an assortment of items.

Mr. Vaughn: I misunderstood you.

The Court: I think that is correct, counsel.

By Mr. Vaughn:

Q. Let me ask you this: Would you name some of the chains in the Westwood area whose stores you checked in the course of this survey?

A. I think I can name them all. Ralph's, Safeway—this was Ralph's before it left the Westwood area, because this has been several years—Ralph's, Safeway, Westward Ho, which is a small chain now, Villa Mart.

Q. Did you check the Food Giant on Westwood Boulevard, south?

A. South, no. This was outside the Westwood Village area, which I was primarily concerned in checking.

Q. Did you check all the stores on the same day?

A. They were checked in the same two-day period, early in the week.

[fol. 2316] Q. In other words, did you check Ralph's on one day and the Westward Ho on another day?

A. Yes.

Q. Suppose they had both had the same prices on a given item, let's say Tide 49 cents on the first day, and they had both reduced their price one cent on the second day, your survey would show that they were selling at different prices, when in fact they were selling at identical prices; isn't that correct?

A. If this occurs, it would be correct. But the days were chosen so these price changes would be minimized.

[fol. 2317] By Mr. Vaughn:

Q. By the way, tell me about that Ralphs store in Westwood Village, would you please? What happened to that store?

A. Ralphs abandoned the store, as I understand. This is hearsay, I presume.

The Court: This would not be the first hearsay in this case.

The Witness: I understood, because of the problem or difficulty in parking. It had no direct parking lot.

Mr. Vaughn: Yes.

The Witness: And parking is a very serious problem in Westwood.

By Mr. Vaughn:

Q. Now, let's get back to the Riverside Drive and Woodman location, if we can.

A. Surely.

Q. Now, trying to divorce your academic pursuits from your normal chores around the house, buying groceries for yourself and your family now. What store do you shop at, where do you do most of your shopping?

A. Speaking for myself alone or myself and my wife?

Q. Speaking for yourself first.

A. In terms of the quantities that I have purchased I would say probably the Ralphs store at Ventura Boulevard.

[fol. 2318] Q. About how far from your house is that store?

Mr. Coyle: If your Honor please, I don't think that is relevant. I object to this line of questioning.

Mr. Vaughn: I think I can develop the relevancy to it, your Honor, because this witness has testified to the competitive picture and—

the Court: Well, first, counsel, without arguing it, what is the purpose of your question?

Mr. Vaughn: The purpose of the question is to determine what stores he shops.

The Court: Well, does it go to the credibility of his opinion?

Mr. Vaughn: I think it will, your Honor.

The Court: Well, if it does I will allow it.

By Mr. Vaughn:

Q. Now, the Ralphs at Ventura Boulevard and what?

A. Hazeltine.

Q. Havenhurst?

A. Hazeltine.

Q. I beg your pardon. About how far is that from your house?

A. Approximately a mile, I think, a mile and a half.

Q. Now, what other stores do you—

The Court: Counsel, you are going to be some extra [fol. 2319] time, I assume?

Mr. Vaughn: I think it is going to be about 15 minutes, your Honor.

The Court: I think we had better take a recess.

By the way, Doctor, credibility doesn't mean that we think you are not telling the truth. It just means in these cases the weight of your opinion.

The Witness: I understand, your Honor.

The Court: We will recess until 2:00 o'clock.

(Whereupon at 12:00 o'clock noon, an adjournment was taken until 2:00 o'clock p.m. of the same date.)

[fol. 2320] LOS ANGELES, CALIFORNIA, FRIDAY, JUNE 14, 1963, 2:00 P.M.

The Court: Proceed.

WILLIAM F. BROWN, the witness on the stand at the time of the recess, having been heretofore duly sworn, was examined and testified further as follows:

Cross-examination. (Resumed)

By Mr. Vaughn:

Q. Professor Brown, you have told us that when you do most of your family shopping, or when you do your family shopping, you usually go to the Ralph's a mile and a half from your home; is that correct?

A. I frequently go there. I would say I go there more times than I go elsewhere.

Q. Fine. Do you ever go to any stores in Long Beach to do your shopping?

A. Not that I can recall.

Q. Do you ever go to any store in Anaheim to do your shopping?

A. I think once I did a little shopping there, coming home from Disneyland one time with a relative.

Q. Just that one occasion?

A. That's right.

[fol. 2321] Q. How about West Covina?

A. I don't think so. There may have been one occasion of the same sort, but it would be once in 10 years.

The Court: I will get you out of that travel area. How about La Crescenta?

The Witness: Never in La Crescenta.

By Mr. Vaughn:

Q. I take it that it is fair to say then, sir, that the stores, grocery stores in the communities or cities which his Honor and I have named, are really not in competition for your patronage; isn't that correct?

A. That's correct.

Q. Regardless of the fact—and this is true—regardless of the fact that the stores in those particular cities may have identical prices and merchandise policies to the Ralph's store a mile and a half from your home; isn't that correct?

A. That's correct.

Q. I would like to show you—do you have a copy there—

The Court: I don't think counsel asked you the next question. I don't mean to run his case for him, but the next question is, the reason you stopped in those stores was because you were on the way traveling somewhere; is that right?

[fol. 2322] The Witness: That's right.

Mr. Vaughn: I thought that was clear from the record.

But that is correct?

The Witness: Yes.

The Court: The Supreme Court might not see it as clearly as we do.

By Mr. Vaughn:

Q. Because you happened to be in the vicinity in an isolated instance; is that right?

A. That's right.

The Court: They don't know these areas, counsel, the way we know them.

[fol. 2323] By Mr. Vaughn:

Q. Do you have Exhibit 84 before you?

A. Yes.

Q. Now, in that exhibit, as I understand it, you have located the various grocery stores. How did you establish the location of those stores, sir? Did you work from a street map, or did you have just this sort of map?

A. No, I had the street map prepared by the Times-Mirror Company, which spots all the stores of the leading chains in the area.

Q. How did you transpose that on to this map that doesn't have any streets?

A. Actually I transposed it on an overlay map, which was not this overlay. It was in terms of circles, and then this was prepared from that overlay.

Q. Copied from it?

A. I did not do the copying, so I cannot say.

Q. You don't know how this—how you located these particular stores on the map from the street map which was used as your source, is that correct?

A. On the overlay that I prepared, the overlay was placed over the street map and the stores were spotted, along with the outlines of the coast, were spotted on the overlay.

[fol. 2324] Q. Do you know if you were using maps made by the same company or the same map maker?

A. I used only the map of the Times-Mirror Company.

Q. All right, sir. During the course of your direct examination I thought I heard you say in making the overlay for Exhibit 84, that you plotted the stores of all competitors. It is a fact, is it not, that you plotted only the stores of what you regarded as the top eighteen chains, isn't that right?

A. That is right.

Q. And that would not be all the competitors, is that right?

A. That is right. That was an error in my statement.

Q. When did you complete preparation of this map, sir?

A. I believe it would be in the spring of 1961, I think.

Q. Was that after you got back from South America?

A. No, that was before.

Q. You had completed it before you left for South America?

A. Before I left for South America.

Q. When did you leave for South America?

A. In August of 1961.

Q. You completed it shortly before August, say, July?

[fol. 2325] A. I think it was a little before that, as a matter of fact.

Q. In June?

A. It may have been June.

Q. In June.

Mr. Vaughn: No further questions.

Mr. Coyle: If your Honor please, I offer into evidence Government's Exhibits 83 and 84.

The Court: Admitted.

The Clerk: Plaintiff's Exhibits 83 and 84 in evidence.

(The exhibits heretofore marked Plaintiff's Exhibit 83 and 84 were received in evidence.)

Mr. Vaughn: I have no objection, your Honor. The witness has indicated, however, that this map was prepared after the pretrial order.

The Court: Counsel, I was waiting for an objection and heard none. They are already in.

Mr. Vaughn: I beg your pardon, your Honor.

The Court: Now I would like to ask one question. On Exhibit 84, I notice on the—what is it on top?

The Witness: Overlay.

The Court: On the overlay, I notice that the chains run between, it says, "interlocking competition between chain [fol. 2326] grocery stores in the Los Angeles area." I think counsel brought out the fact that you did not put in the other competition, independent competition?

The Witness: I think so. As a matter of fact, that would strengthen the general theory, had I done so, I think.

The Court: The theory of what?

The Witness: Showing that there is a substantial interlock between retail grocery units.

The Courts: Well, it may or it may not. I don't know. But what I was getting at is, have you any way of telling me

now, from your surveys, generally what the independent situation is in these areas? For example, on 84, you have the—let's go down to the southeast portion. Have you any idea as to what the independent situation is there?

The Witness: No.

[fol. 2327] The Court: Let's go up to the northwest portion on Exhibit 84, the extreme top; do you know what the independent situation is there?

The Witness: Only on the basis of limited personal observation, which I don't think is complete enough to be reliable.

The Court: Can you tell me for example in the San Fernando Valley what the independent situation is there? You live out in that area?

The Witness: Yes, that's right. In the immediate area near which I live I can say that if I were to put links in there, I would add, of course, such stores as Gelson's, at least one or two other supermarkets in the immediate area.

The Court: Have you in your survey considered or determined whether any grocery stores, either chain or independents, have gone out of existence since 1960?

The Witness: Only, again, from the point of view of my knowledge of the immediate neighborhood.

The Court: Well, what would that be?

The Witness: I know that one or two independents have gone out of business, small stores.

The Court: How close is that to a Safeway, for example? Let's take one. Name one first, let's work on one.

[fol. 2328] The Witness: A little store not far from us called Ferrilli's, which has gone out in the last six months.

The Court: How big a store was it?

The Witness: It would be smaller than what is sometimes called a superette, I think. It is a rather small store, no parking, probably 20 by 50 in size.

The Court: Rather limited in inventory?

The Witness: Quite definitely limited in inventory. It had a small meat department.

The Court: Has any new store gone in in that vicinity in the last couple of years?

The Witness: Yes. When Bullock's completed their Fashion Park Shopping Center, the Westwood Ho opened a market in that center.

The Court: How about any of the chains?

The Witness: The Westwood Ho is a small chain.

The Court: Excuse me. What I should have said was, any of the well-known chains, Ralph's, Safeway, Von's, or Shopping Bag.

The Witness: Von's opened a store, I think, about 1954 or '55 at Riverside Drive—

The Court: I am talking now since 1960.

The Witness: The Hughes store I think opened a little before that on Van Nuys Boulevard.

[fol. 2329] The Court: Have there been any of these stores such as Safeway, Ralph's, Alpha Beta, Food Giant, Market Basket, Mayfair—any of those opened a store anywhere in that vicinity since 1960?

The Witness: Not that I know of.

The Court: Now, the other store, what was the other one you said they put out of business?

The Witness: Ferrilli's, the little one.

The Court: Is that the one we have just been talking about?

The Witness: Yes.

The Court: What was the other store that went out of business?

The Witness: There was an Italian—a little grocery specializing in Italian food specialties, I think just off Van Nuys Boulevard on a side street.

The Court: I take it that is not to be classified in the sense of a grocery store, then, as we are talking about it here?

The Witness: Not in terms of a major grocery store.

The Court: That's all. Anything further, counsel?

Mr. Coyle: I have one question.

Q. Dr. Brown, how did you arrive at the two-mile area [fol. 2330] that you used in plotting these stores?

A. Well, I believe in the answers to the interrogatories that there was a statement to the effect that a one and a half or two-mile limit was a maximum, and I used this as a more or less conservative estimate then, in my view a conservative estimate of the limit of a trading area.

I do not believe that a trading area can be defined mechanically in terms of miles or driving time. It is an aver-

age, and I think, as Mr. Von der Ahe said, in one area it is much smaller, in another area it may be much larger.

Furthermore, when we talk about trading area or draw about 60 or 70 per cent of the customers, it may be one area, the term really ought to be defined. If we are talking thing; if we are talking about 95 per cent of the customers, it may be another, a much larger area; and, if we are talking about all of them, obviously it is still larger.

Mr. Coyle: Those are all the questions.

The Court: I would like to ask a few questions.

I want it understood that I am merely trying to ascertain facts that perhaps may have some bearing insofar as I see the case.

Doctor, hasn't the over-all picture of the food market changed in the metropolitan area since 1940, haven't there been substantial changes in conditions?

[fol. 2331] The Witness: Yes, sir. There has been a rather decided decrease in the number of units per thousand population. This is, I think, a basic relationship between grocery stores and the area.

The Court: Have you taken into account in your consideration of these matters factors such as in the Los Angeles area people move more than they do in the eastern areas? This is a town on wheels, you know that, don't you?

The Witness: Yes. And, as a matter of fact, I am in the middle of a study now, I haven't quite completed it, in the change of this relationship between stores and population for all kinds of stores, from 1929 to 1958. My figures, completed from 1929 to 1948, show rather conclusively that this change is greater in the Los Angeles area compared to other areas, metropolitan cities, primarily I think because of the mobility of the population.

The Court: Well, the population— isn't it a fact, from your findings, that the population in this area—as a matter of fact, let's put it this way: It was a rare thing until recent years to have a lease on apartments?

The Witness: Yes.

The Court: Everybody was in one month and out the next, more or less, so to speak?

The Witness: That's right.

The Court: So that you have a population moving hither [fol. 2332] and yon all over this area?

The Witness: Yes.

The Court: Now, since World War II there has been considerable change in financing of homes, as you know, and a person now can move into a house that costs \$25,000 or \$30,000 for just practically nothing down, as you know?

The Witness: That's right.

The Court: And move in and pay less than rent?

The Witness: Yes.

The Court: So these new neighborhoods blossom overnight, don't they?

The Witness: At a tremendous rate.

The Court: And I am wondering if in your study, whether you have determined that the large percentage of the people that were moving into those areas were leaving vacancies in the other parts of the city.

The Witness: In one study, as I say, completed only to '48, I took one section of Los Angeles, the area approximately bounded by Santa Barbara on the south, I think it was Pico on the north, Figueroa on the west—pardon me, on the east—and I believe the west boundary of that area was Western. It has been some time since I have looked at this particular aspect of the study—

The Court: What happened to that area?

[fol. 2333] The Witness: The area has declined, I think, slightly in population between 1929 and 1948, the figures are not up to date. During that period the number of stores per thousand population also declined, which meant stores actually went out of business at a rather rapid rate in that area, because even with the decline in population, the decline in number of stores related to population was even greater.

In other areas, I compared that with an area in the Valley, San Fernando Valley, which has been a rapidly growing area, and there the number of stores has increased, obviously, and up to 1954 the relationship between stores and population, however, had decreased.

[fol. 2334] The Court: What I am trying to ascertain, if it is ascertainable, is that much of the change in the location of stores has been brought about by the shifting population, hasn't it, a good part of it?

The Witness: Well, obviously stores follow population out.

The Court: Yes, that we concede.

The Witness: And of course——

The Court: But I am talking about shifting, not just growing, but shifting population.

The Witness: Most of the places from which people move are filled up, that is, the housing still stays there and new people move in from the East, typically. So that there are relatively few areas in a city where the population declines, and therefore—while there is a shift in the number of people living in a particular area—they still buy groceries and there is still a demand for food service.

The Court: But if you will recall, Los Angeles doubled in population every ten years up until when, 1930, was it?

The Witness: No, I guess 1940 was not quite double.

The Court: No, I don't think so. Up until 1930.

The Witness: 1930.

The Court: So the increase in stores was, I take it, going along with population increase.

[fol. 2335] The Witness: Up to 1930.

The Court: Then there became this more or less spread, as we call it, or to some extent a redistribution of population.

What I am trying to ascertain, if I can—I don't know whether it is ascertainable—is just what is the nub, what is the basic competition, the basic situation or basic competition in the metropolitan area?

You have got some chains showing that maybe, if one man gets an idea here it may chain react all the way through a certain group. But what is the basic day-to-day competition between—I can't say between, but I mean in this Los Angeles metropolitan area? What are we talking about when we say basic competition?

The Witness: Well, your Honor——

The Court: Or is that a bad word, maybe it is a bad word.

The Witness: I think there are so many forms of competition that it is hard to say that there is one basic competition.

Firms compete on many different levels, I think. They also compete in many different ways.

I think I mentioned that Von's moved in in Riverside, for example. They opened a newer store with automatic en-

trance doors and so on. Within a year or two at least [fol. 2336] Ralphs modernized its front and put in these kind of doors.

The Court: That is competition, isn't it?

The Witness: That is competition.

The Court: So the competition is increasing by this movement, isn't it?

The Witness: That move certainly indicates that there is competition between the two.

How often this occurs—well, let me put it this way: When you say increasing, your Honor, I think you are calling for a judgment on relative intensity. I don't feel qualified to really give an answer on relative intensity because I don't think—in the first place, I haven't made a study of relative intensity, and in the second place I don't think that there are any measures that anybody has ever developed that will give fine changes in relative intensity.

The Court: Well, what is happening then—or do you classify yourself as an economist?

The Witness: Oh, market specialist.

The Court: Well, that is an economist, isn't it?

The Witness: Partly. We try to say we are practical economists.

The Court: Well, practical, though, you mean—

[fol. 2337] The Witness: We try to explain things a little more—

The Court: A little more on facts?

The Witness: A little more on facts.

The Court: All right. We will accept that for the moment.

Now, let me ask you this, when you talk about competition in the metropolitan area, what do you mean?

The Witness: I mean the reaction of individual firms to a move by any other firm, and their attempt to attain business, to get business in the area and, if necessary, away from the other firms, or to get it back if they lose it.

The Court: Well, as you know, most of these concerns, Safeway, Ralphs—particularly those two, they are older here—they have been closing stores and opening new stores, is that right?

The Witness: Safeway certainly has, I think has been doing that.

The Court: Well, I think Ralphs has, too, hasn't it?

The Witness: Ralphs, too, yes.

The Court: So what is the economic impulse, as far as you know, as an expert, that causes this situation where a concern such as Safeway or Ralphs closes this store down and moves somewhere else, opens up another store?

[fol. 2338] The Witness: In the case of Safeway, I would hazard the guess in the sense that Safeway had a great many small stores which, by and large, are becoming less popular with customers, and that they preferred to concentrate their drawing power in modern, larger stores.

The Court: Why, if you know, are they becoming less popular? This is what I don't understand.

The Witness: Well, I don't know that. Except that if they were still as popular as they were before, I assume Safeway wouldn't close them. If they were making money, as much money as Safeway could make out of that capital, I think Safeway would keep them in business.

The Court: Well, now, another factor, I wonder if you have considered in Los Angeles in 1929, which was a glowing year up until October, there were many persons afoot in this town, did you know that?

The Witness: I was one of them.

The Court: Do you know what the per capita automobile population was in 1929?

The Witness: It was a lot less than it is today, I am sure of that. But I don't know what it was.

The Court: Well, wouldn't you think that that factor, wouldn't in your opinion that factor, the fact that many, many people now are riding automobiles instead of streetcars and buses, that would have changed the reason [fol. 2339] for making larger markets?

The Witness: I think that is the most important factor in explaining the shift in store size, for example.

The Court: Were you here in 1929?

The Witness: Yes, sir.

The Court: You remember we had a streetcar line on almost every street here, is that right?

The Witness: Yes, sir.

The Court: And we had bus lines to Hollywood and we had also the red lines which was the Pacific Electric?

The Witness: Yes, sir.

The Court: And thousands of people rode those cars on those lines.

The Witness: Yes, of course.

The Court: And we had—incidentally, we had automobiles on the street that I think were some of the first invented, you remember those? Some of them went back as early as 1903, as I remember it—the way they looked, anyway.

The Witness: I think I rode one to Lynwood when I was a boy, an H.M.S. Studebaker.

The Court: Well, you recall then that the traffic situation was more concentrated in the streetcars and buses at that time.

The Witness: Yes.

[fol. 2340] The Court: Whereas today the shift has been over to the automobile.

The Witness: Yes.

The Court: Now, in your opinion has that been one of the factors that has changed the grocery makeup, the distribution of groceries in this area?

The Witness: Unquestionably.

The Court: All right, counsel.

Mr. Coyle: I have no questions.

The Court: I don't want you to think I am on either side. I am just trying to find the facts.

Mr. Coyle: Yes, your Honor.

The Court: You know, if a judge asks quite a few questions the lawyer, whoever loses says, well, he tried the case for the other side. But I am only trying to ascertain the facts, because it is a difficult problem in this case, and that is: What is the competition that has been lessened. I am trying to find it.

I may ask you to pinpoint it for me at a later date.

Mr. Coyle: Yes, your Honor.

Mr. Vaughn: No questions.

The Court: One other thing before you go.

Can you pinpoint to me any change in the competitive situation since 1960 in this area, metropolitan Los Angeles [fol. 2341] area?

The Witness: I think there are several changes, your Honor. How important they are is another question.

The Court: But I would like to know what in your opinion they are.

The Witness: Well, one is the introduction of the dis-

count house into the grocery business. Another is the tendency, I think this change in the pattern with respect to deep cut specials.

Another is the —

The Court: Before you go on, may I interrupt you there? The deep cut specials, you remember that—you mean to some extent that has been eliminated or increased?

The Witness: I think the use of leaders is still very evident. I think that, as Mr. Von der Ahe testified, the extreme loss leader has disappeared, that is, as I believe he said the 19-cent a pound coffee. Now it is what, 49 cents a pound. Instead of that the regular prices are 69 and 79 and special is 49, rather than 19. That is a change.

The Court: May I just ask one further question? Have you at any time in your surveys made an effort to ascertain the effect of that type of advertising on the customer, or on the purchaser?

The Witness: I think the use of leader is very important in a section of the market.

The Court: What do you base that on?

The Witness: On interviews with consumers. I attempted, as I said, over a number of years to try to get the consumer's attitude with respect to shopping habits and so on.

I would say also that another factor that would lead me to that conclusion is the fact that all the major chains must spend millions of dollars in advertising, and this advertising is on specials, this is practically all the advertising is about. And I presume that the executives of the company don't throw their money away unless it brings people in.

The Court: Well, your presumption is wrong in some cases. Some of them have gone broke. For example, just as a way of inviting your attention, did you know that Safeway disbanded all of its stores in a certain part of New York?

The Witness: It was sort of an isolated operation, as I understand.

The Court: It cost them a fortune.

The Witness: Cost them a fortune.

The Court: That was run by high executives, some of the best in the country.

The Witness: I don't think anyone is infallible, your [fol. 2343] Honor. There are a lot of examples.

The Court: Well, you were giving me a list now and I interrupted. You remember, you had given two——

The Witness: Another factor of the tendency would be more elaborate facilities. I am sure that that is a change—I don't think I could base that as having started in 1960, because it has been apparent I think for quite a long time.

The Court: That has been in progress for a considerable number of years, hasn't it?

The Witness: Yes.

The Court: As a matter of fact, haven't stores like Ralphs Stores almost changed in the last, let's say, well, the building program opened up again about 1947, after the war, 1948, is that right?

The Witness: Yes.

The Court: So haven't they, for example, changed most of their stores by putting in more beautiful fronts and more spacious shelving arrangements and all of those things?

The Witness: Yes. As a matter of fact, before the war, your Honor, I think many of the stores in supermarkets were open front stores, that is, with the produce department in front, displays and so on. So that this tendency is perhaps a long run tendency toward more elaborate facilities.

The Court: Go ahead. You were giving me a list. Do you have any others?

The Witness: No, I don't think I can add any at the moment.

The Court: Well, from your surveys and checking of the industry, do I understand you to say in effect that the financing ability, the ability to finance is an important factor in the competition in this area?

The Witness: I don't believe I said that, your Honor.

The Court: How about it?

The Witness: Because I simply don't know.

The Court: Well, Ralphs would be able to borrow money, at least quicker than the average independent, wouldn't they? Or Safeway, or Von's or Shopping Bag, or Food Giant?

The Witness: I can't answer that question accurately because I simply don't know, your Honor. I have not been in—this is a management problem and I have been prima-

rily concerned with the consumer aspects and the price effects, so to speak.

[fol. 2345] The Court: Well, in other words, then—I don't mean to depreciate your testimony, but you haven't really considered the effect on the competitive market of financing?

The Witness: That's right.

The Court: On purchase of the store building, the property, parking space, and things of that kind?

The Witness: Certainly the financing, I have not.

The Court: Go ahead.

Mr. Coyle: I have no more questions.

The Court: I thought I might stir you lawyers up to further questions.

Very well, you may step down, sir.

The Witness: Thank you.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: I notice neither one of you asked the question, gentlemen, maybe you were both afraid to, and normally I am not afraid to do it, but I didn't want to take over, just ask him the cold, blank question, if there had been any substantial lessening of competition. That's the question I have to decide, but I assume that he is qualified to testify to that.

Mr. Vaughn: The reason I didn't make any reference to that subject is that I thought his testimony on direct was so limited as to this particular exhibit that they didn't get into that.

Mr. Coyle: I think his testimony was limited.

[fol. 2346] The Court: It was limited, but the trouble with limited testimony is that inferentially it goes to predicate some kind of finding on competition, doesn't it?

Mr. Coyle: Yes, but we make a practice of not calling economists in these cases to testify to ultimate facts.

The Court: I am not going to assume that he would have been against you or for you, counsel, but I just noticed that you didn't ask him that question. It is all right. It is your case.

Mr. Coyle: Your Honor, I would like to read into the record a portion of the deposition of Mr. William Delbert Hayden, which was taken—

The Court: Incidentally, counsel, both of you could have objected, if you thought I was going outside the scope of the direct examination. The court is subject to the same objections as you lawyers are.

Mr. Coyle: I had no objection.

The Court: All right.

Mr. Vaughn: I thought the questions were quite helpful.

The Court: Any time I ask a question, if you think it is irrelevant or improper or immaterial, incompetent, or otherwise, I welcome that you object.

Mr. Vaughn: Your Honor, I take it Mr. Coyle is about [fol. 2347] to read into the record a portion of the deposition that is already in the record.

Mr. Coyle: That's correct.

Mr. Vaughn: It seems to me that is argumentative and ought to be reserved.

The Court: Why don't you reserve that to the time of argument?

Mr. Coyle: All right, your Honor.

The Court: We are about at that time now, aren't we?

Mr. Coyle: I would think so.

The Court: Are you finished?

Mr. Coyle: No. I have one more witness.

The Court: Call him.

Mr. Coyle: Dr. Ward Jenssen.

The Court: The reporter tells me that he is in confusion as to the copying of Mr. Hayden's either depositions or affidavits. He said he understood there were two. I thought they were affidavits rather than depositions.

Mr. Coyle: There are two Mr. Haydens, to begin with, and I think they each have a deposition.

The Court: That is where the confusion lies.

Mr. Coyle: I am wrong. There are two Mr. Haydens, but there is only a deposition for one Mr. Hayden. But there are two affidavits.

[fols. 2348-2362] The Court: That is what I remember, two affidavits. You asked that one, the prior affidavit, go in, be read into the record.

Mr. Coyle: That is correct.

The Court: So as to connect up with the deposition.

Mr. Coyle: That's right.

The Court: So the record is correct, there are two affida-

vits and one deposition of Mr. Hayden. Then Mr. Coyle came back and said, now since the deposition has gone in and since they put in a new affidavit, that the deposition would be meaningless without the first affidavit. Is that correct?

Mr. Coyle: That's correct.

[fol. 2363] WARD J. JENSSSEN, called as a witness by and on behalf of the government in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Ward J. Jenssen, J-e-n-s-s-e-n.

[fol. 2364] Direct examination.

By Mr. Coyle:

Q. Dr. Jenssen, what is your residence, for the record?

A. Los Angeles, California, 6042 Second Avenue.

Mr. Alsop: Your Honor, I am having difficulty hearing the witness.

The Court: Speak out.

By Mr. Coyle:

Q. What is your occupation, Dr. Jenssen?

A. I am a marketing consultant.

Q. What is your academic background?

A. Bachelor's Degree from Northwestern University, Master's from Northwestern University; my doctorate is from the University of Southern California. I formerly served on the graduate school faculties of both Northwestern University and the University of Southern California, entered the marketing consulting field in Chicago in 1946, have been continually active as a marketing consultant to this time.

Q. Have you done any marketing work in the retail grocery field?

A. Yes, sir, our firm and myself tend to specialize in the retail food industry, market research and marketing work

for the retail food field. We have served such chains locally, for example, as Food Giant, Ralph's, Market Basket, [fol. 2365] Lucky Stores, Boys, Mayfair Markets, numerous others.

Q. Were you requested by the government to prepare certain exhibits?

A. Yes, sir, I was.

Q. What type of exhibits were you requested to prepare?

A. May I refer to this, your Honor?

The Court: Yes.

Mr. Coyle: Let the record show that the witness is referring to Government's Exhibit 85 for identification.

The Witness: The exhibit to which you just referred is one that was prepared by our office, and what it indicates is this: There are six configurations outlined here on a map. The star stores represent a Von's market, the circles represent either an existing or a proposed Shopping Bag. Any person living within any portion of any of these circles would find both a Von's and a Shopping Bag store readily accessible to them in terms of current shopping patterns in Southern California.

Would you like me to elaborate on this "current shopping patterns"?

Q. Yes.

A. There are very few shoppers who ever patronize a single market. Consequently, homemakers tend to patronize, particularly in the Southern California area, where they are especially mobile, ease of transportation, large number of cars per family, ready access—there tends to be a number of factors that shoppers consider in determining which store or which stores at which they will shop. There has been, on the basis of our experience in consumer interviews, there seems to be only one delimiting factor, and this is how far is a market from a respondent's home in terms of driving time? Particularly as Southern California homemakers have become increasingly mobile they have tended to measure or assess the distance to a market in terms of how long will it take me to get there, rather than in terms of blocks or miles or other geographic measures. What we did, therefore, was to mark off a 10-minute, which seems to be a conservative average for

Southern California shoppers in their shopping patterns, travel at least 10 minutes, any store within a 10-minute range of their home they will by and large consider to be a possible store at which they might trade. What we did, therefore, was to, through actual driving tests, measure a 10-minute drive from a number of Von's—as a matter of fact, 16 Von's stores, 21 proposed or existing Shopping Bag stores; then around each of these stores we plotted a circle—not necessarily a circle, but a configuration describing a 10-minute striking distance, let's call it. These circles in Exhibit 85 represent the overlap areas coming from these original driving time circles. Thus, both a Von's and Shopping Bag store could expect to draw customers from any person living within any of these six major configurations outlined in the exhibit.

[fol. 2368] By Mr. Coyle:

Q. Did your study include ascertaining the population residing in these areas that were accessible to both Von's and Shopping Bag stores?

A. Yes, sir, it did. After we had established through empirical testimony—driving times—after we established the striking circles, call them, and from these developed the overlap area, which are the circles shown on this chart, we then ascertained, from 1960 census data, the approximate population living within each of these six configurations. That is shown on the lower left-hand portion of the chart by each of the specific areas and by totals. As of the 1960 census date we would estimate that approximately 1,058,000 persons lived within the six overlap areas shown.

Q. Did you also estimate their expenditures for groceries?

A. Yes, we did. In an effort to be conservative we used what is probably somewhat less than the annual Southern California expenditure for food. I at any rate arrived at the figure for these persons of approximately four hundred eighty-one and a half million dollars per year.

Q. Did you make any verification of this on this basic premise of ten minutes driving time?

[fol. 2369] A. Yes, we did. Our original estimate of approximately ten to twelve minutes driving time as being the normal range which a homemaker will travel to a food store was based on our previous studies which go back, at

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east in Southern California, to about 1949 or thereabouts, 1949 or 1950.

In the course of that time we have conducted interviews with, I would estimate at least a quarter of a million homemakers in the Southern California area regarding their food-buying patterns. It was from these data that we originally estimated the approximately ten to twelve-minute driving range.

However, after we had plotted these tentative circles, the question arose as to whether the individuals living in these particular specific areas might indeed, in some way, be non-typical, perhaps they habitually drove shorter distances, shorter driving times than the typical Southern California average of ten to twelve minutes. Consequently, we drew samples of homemakers residing within each of these circles.

Our total sample was 1167 respondents. And essentially we asked them to think of the food stores at which they regularly shop, and then having these food stores in mind, asked us to—or we asked them to describe the distance of that food store from their home, from which we got [Ex. 2370] their driving times.

Our results—I can give these to you area by area, or I can give you, I can give them to you for the total six areas combined—there is relatively little variation from one area to another, it is slight.

But by way of a total, 70 per cent of the persons whom we interviewed in these six areas indicated that they either regularly, frequently or at least occasionally visited a food store which was at least ten minutes driving time from their home, in many instances it was over ten minutes. But we used ten minutes as an average of the original driving time used to plot the configuration.

If it is of interest area by area, that these are shown—areas 1 and 2 we combined in our interviews. 70 per cent of the persons in areas 1 and 2 frequently visited a food store either regularly, frequently or occasionally at least ten minutes from their home.

The Court: May I ask you, when you put the question to them, did you put it in that form?

The Witness: The form of the question, your Honor, was really there were several questions. We first indicated to

the respondent, "We are conducting a study on retail buying patterns and would like to ask you a few questions."

The Court: Was this done orally?

[fol. 2371] The Witness: Yes, sir, it was.

The Court: By—

The Witness: By personal interview.

The Court: In other words, you hired people to go out and do it?

The Witness: Yes, sir.

The Court: What check did you have to be sure that they went out and talked to people? How did you check on it?

The Witness: Several ways, your Honor. First, the people who were hired for this job are interviewers who we have regularly used over a period of a number of years. We selected our best interviewers for this.

Additionally, the way the sample was chosen was in accord with the same sampling pattern that the United States Census used, which was we sent respondents through a randomly selected address rather than leaving the choice of who the interviewer was to interview, leaving this up to the field worker herself, we supplied interviews with a predetermined, with a random sample of addresses within the area.

Consequently—

The Court: What I am interested in, did they write down something on each one?

The Witness: The interviewer had a ballot from which [fol. 2372] she questioned the respondent. She questioned the respondent, "Think of the stores at which you regularly, frequently, occasionally shop for food. Now, where are these stores?"

The Court: The trouble, I am asking you, you see you have compounded the question. The answer means nothing to that question. You say occasionally, frequently and often. And the man says yes. Now, what does that mean? If he says no, what does it mean? That is my problem.

It is like a lawyer when he compounds a question here, we sustain an objection to it because we don't know what the answer would mean.

The Witness: Let me develop it a little more clearly then, if I may.

We ask the respondent first, "Where do you shop for food?"

And the respondent would name the stores—excuse me, I am sorry—we ask first, "At what stores do you regularly shop for food, and by regularly we mean more than six times a month you are in the store shopping for food."

And the respondent would give us an answer.

And then we would say, "Now, how far in terms of driving time is that store from your home?"

And the respondent would give us some estimated driving time, based on her own experience.

We would then ask, "Are there any other stores at which you shop more than six times a month?"

If no, we then go to asking about frequent shopping, which is defined as four to six times a month, and occasional shopping as less than four times a month.

So we gave each respondent an opportunity to play themselves out in terms of stores at which they shop regularly—and in many instances these were two or three stores—then stores at which they shop frequently and then stores at which they shop occasionally.

And in each case, after the respondent had named the store, we asked, "How far is that from, how long does it take you to get there from home?"

Does this clarify it?

The Court: Well, it does, except you say most of them said ten or twelve minutes.

The Witness: The average time tended to be more like 12 to 15 minutes. Many of them, of course, said two or three minutes.

And at the other extreme are persons in the sample who would patronize stores 15 or 20 minutes from their home.

The Court: Let me ask you this, how long will it take you to drive from the Federal Building to your home this afternoon?

[fol. 2374] The Witness: To my home?

The Court: Yes, approximately.

The Witness: From the Federal Building to my home?

The Court: Yes.

The Witness: Can I come the other way?

The Court: Yes.

The Witness: I did that this morning.

The Court: Yes.

The Witness: Fifteen minutes.

The Court: Well, how far is it, do you know in miles? It is about 70 blocks, isn't it?

The Witness: That would be a good estimate, yes. About ten miles—no, that would be too fast, wouldn't it.

The Court: You see what I am getting at is the frailty of the questions of this type. The average person, it is like smog, you say, "Where do you live?" and the fellow says, "I live out in such-and-such an area, we don't have any smog in my district."

The Witness: Could I point out a different—

The Court: What I am getting at, I am trying to find the trustworthiness of your questions and answers.

The Witness: Yes, sir.

The Court: The average human being has a tendency to flippantly say, oh, ten or fifteen minutes, they live in North [fol. 2375] Hollywood; how long does it take you to drive there; oh, fifteen or twenty minu'es. Well, they must be taking a helicopter. Do you follow me?

The Witness: Yes, sir.

The Court: Now, how do you get at it to find out how these answers are trustworthy? That is what I would like to know, because this could be important.

The Witness: All right. Let me, if I may, back track a little bit.

First, however, let me point out that we are talking about Southern California homemakers who tend to be considerably different, I think, in their over-all living patterns than I, for example.

We found years ago, a number of years ago when we used to do market research studies out here for the food industry, we used to ask respondents where they shop and how far this was from their home, in an effort to establish trading radii.

We used to ask how far was this from their home. Female respondents found it very difficult to express answers to us in terms of miles. Therefore, with no intent on our part we found we were getting answers such as, "Well, I don't know how far it is but it is about ten minutes this way, it is about fifteen minutes that, and it is about twenty [fol. 2376] minutes this way."

The Court: Now, those are female minutes we are talking about, female driving minutes?

The Witness: Yes, sir, perceived female driving minutes.

The Court: Did you find there was a difference between male and female in their answers on minutes?

The Witness: We have done very little questioning, your Honor, of men. An occasional study for the food industry where we may have reason to question men.

The Court: You understand what I am talking about, don't you?

The Witness: Yes, sir, I do.

The Court: The lady says she only has to run the comb through her hair and she will be right with you. Now that means about half an hour, doesn't it?

The Witness: Yes.

The Court: That is what I am talking about.

The Witness: Yes.

The Court: These are all factors, aren't they?

[fol. 2377] The Court: These are perceived minutes. Although another element in here, because we were finding so many women—this now goes back a number of years, this goes back to the early 1950's or so—because we were finding so many women who were telling us where they shopped in terms of minutes, rather than miles, we thought this might be a handy device to use in some of our interviews, rather than asking them how far in miles, we just asked them how far in minutes.

Before we switched to that pattern of interviewing we did a great deal of internal work to insure that they reasonably well knew what they were talking about. They were not saying, they were not naming a market on the other side of town and saying about a 10-minute drive, nor were they naming a market just down the street and saying, oh, about a 10-minute drive.

Before we used this form of questioning—and this was considerably before the specific study here, we wanted to insure ourselves that they did reasonably know what they were talking about.

The Court: May I ask one other question, then, counsel, and you go ahead after this.

How far, generally speaking, on an average, is 10 minutes in miles?

The Witness: I think this can vary considerably, your [fol. 2378] Honor, from one community to another. In some communities it is—oh, take for example, in the heart of Long Beach, the heart of Long Beach a 10-minute drive would not be very far.

Take some of the open Valley areas—

The Court: How far would it be, how far could I get in Long Beach on a normal day—excluding Friday and Monday—let's just take Tuesday, Wednesday and Thursday, and not bother about Saturday, Monday or Friday, which are all bad driving days.

The Witness: Yes.

The Court: How far in Long Beach would you estimate a car would get in 10 minutes? I mean just an approximation.

The Witness: I would guess under five miles.

The Court: In 10 minutes, how far?

The Witness: I don't know. I will tell you what my rough computation is.

The Court: Yes.

The Witness: I am presuming something under, an average of something under 30 miles an hour, considering stop lights, traffic conditions, stop streets, and et cetera. At 30 miles an hour, 10 minutes would be about five miles.

Consequently in 10 minutes in the general Long Beach [fol. 2379] area I presume one could get not much further than four, perhaps four and a fraction miles.

The Court: Well, as I understand you, it would be—a good average would be four miles.

The Witness: A good average.

The Court: Taking in all conditions.

The Witness: Freeway traffic in Southern California.

The Court: Yes.

The Witness: Excluding freeway travel—I don't know, certainly, but—

The Court: As an approximation.

The Witness: I would guess it is a good average.

The Court: Well, as a matter of fact, counsel, hasn't all the testimony indicated heretofore that the draw area was about four miles on these stores?

Mr. Coyle: A good part of it has, your Honor.

Mr. Alsup: No, your Honor. Mr Von der Ahe testified it varied with stores, some had a mile, some had a mile and a half, some two miles—

The Court: That was more or less as a tendency, though, wasn't it, counsel? I think Mr. Von der Ahe conceded that there would be some draw within the four-mile area, but [fol. 2380] that the heavy draw would be, say, the first mile.

Mr. Alsup: That is correct.

The Court: Am I correct about that?

Mr. Alsup: Yes, the great bulk from the closer area and some draw from farther areas.

The Court: But the draw area more or less has been designated pretty much, without saying how much and from what part of the area, as being about the four-mile area.

Mr. Alsup: Yes.

The Court: Generally speaking.

Mr. Alsup: Yes.

The Court: All right. Go ahead, counsel.

By Mr. Coyle:

Q. Dr. Jenssen, in the course of your interviews that you made, did you ascertain the address of the store in which the women said they shopped?

A. Yes, sir, we did. Actually there were several verifications involved here. First I mentioned the particular way in which we drew the sample, the interviewer had to interview a particular respondent at a particular address.

At the time the ballot was turned in, we verified 15 per cent of these by telephone calls with the respondents, merely asking, "Were you interviewed recently?"

[fol. 2381] The second verification that automatically was clamped into it is, in asking the respondent the approximate location or address of the store, respondent said, well, shop at least several times a week at Store A, and the interviewer would ask where was this store located. At the approximate intersection of—the respondent would in some way describe the location.

We then, in tabulating the times would attempt to verify that the respondent was not completely wrong, in naming the approximate length of time it took her to reach a particular location, store location.

This, of course, was not a precise check, but within reason.

[fol. 2382] Q. With respect to your driving time study

that you yourself did, or your organization did, in these various areas, did you have any control on those tests?

A. Here is how we handled those. We used a number of different drivers. For each of the locations involved here three different drivers ran each location.

The Court: Were they men or women?

The Witness: They were all women, sir.

The instructions to the driver were to start at the parking lot of the store, drive for ten minutes, moving with the normal flow of traffic, don't try to speed up your time, don't try to beat stoplights, don't try to pass other cars unless they, in turn, are not moving with the normal flow of traffic, obey all traffic rules, don't try to push, just a normal flow of traffic moving, start your stopwatch at the time you leave the parking lot, at ten minutes stop and record the intersection at which you are now. Then turn around and drive backwards. What we were looking for—return via the same route. What we were looking for here was the possibility of driving time in one direction taking the test driver farther than driving time in the other direction. As it turned out we found no significant differences in this regard. The driving tests were run at various days of the week, varying times of the day, and I believe I mentioned each driving run was performed by three separate drivers, [fol. 2383] unaware of the results of the other one.

We took the shortest distance of any of the three drivers. For the most part they arrived at about the same point, plus or minus a block or two.

Directions in which they drove. They drove for practical purposes eight points of the compass. Generally north, generally northeast, generally east, generally southeast, and so on. The way the streets are laid out, of course, they could not go directly northeast, say, but they were to head in a generally northeasterly direction, so on, for eight points of the compass.

Q. Dr. Jenssen, have you read or studied the affidavit or the exhibits prepared by Dorothy Corey and submitted as defendants' exhibits?

A. Yes, sir, I have.

Q. What is your evaluation of these studies?

The Court: Isn't that, in effect, asking the valuation of somebody else's testimony?

Mr. Coyle: Yes, your Honor, expert testimony.

The Court: If they let you do it, all right.

Mr. Alsup: I object, your Honor. I would like to cross-examine on the point, but I will object to it. It would unduly prolong the trial.

The Court: Is that permissible, counsel?

This is a modern touch, as far as I am concerned. It [fol. 2384] sounds like the old days when they called character witnesses. They called A, and he would testify the defendant's character is good. They would call B, and he would say A's reputation was bad. And they called C, and he would testify they both had a bad reputation for truth and veracity, and so on and so on, until the court put a stop to it.

That was reputation testimony. What you are doing now is to have one expert testify that the other's testimony is not valid testimony, isn't that what you are doing?

Mr. Coyle: Yes, your Honor.

The Court: Is that proper?

Mr. Coyle: I will withdraw the question.

The Court: Tell me if it is proper. I want to learn something. I am trying to learn as I go along. Is it?

Mr. Coyle: I have seen it done in other cases.

The Court: Counsel, you have seen anything happen in a courtroom somewhere, but I don't try to emulate those courts.

Mr. Coyle: All right.

The Court: I try to conform to some standards and rules, as near as I can, as near as I know, so I am not going to permit you, unless you show me some law.

Mr. Coyle: I withdraw the question.

I offer into evidence Government's Exhibit 85, your Honor.

[fol. 2385] Mr. Alsup: May ruling be withheld until we have had an opportunity to examine the document?

The Court: I thought you had seen it. I am sorry, counsel.

I would like to ask one question or two before you do. I may be interfering with your cross examination. I will be glad to wait.

Mr. Alsup: No, sir.

The Court: Look at Exhibit 85, and let's look at Area 2. How far would you say it is from the star at 22 to, I guess you would call it the round black dot.

The Witness: From the star to the black dot—

The Court: In miles.

The Witness: In miles?

The Court: Yes.

The Witness: I can't tell, your Honor. I don't have a geographic scale.

The Court: You don't live in the valley?

The Witness: No.

The Court: Let's go over to where you live. You live out at 64 something Second, 6400?

The Witness: I don't think we have that area on here.

The Court: Are you fairly well familiar with the conditions—let's see. Where are you most familiar with traffic [fol. 2386] conditions outside of your own home area? It would be what part, would you say? How about the Downey area, are you familiar with that?

The Witness: Not too well. Let's go back to the valley, if we may.

The Court: The valley?

The Witness: Yes.

The Court: All right. Let's go over here to Area 1, is that what your mean?

The Witness: I am on Area 2 coming off the Ventura Freeway at—how about Laurel Canyon? That should be on here, should it not?

The Court: Laurel Canyon is miles away from where we are talking about.

The Witness: Here is Laurel Canyon, down at Studio City, the lower portion down here.

The Court: Laurel Canyon is about how far from, would you say, from, well, Panorama City?

The Witness: I don't know. Milewise?

The Court: Yes. Do you know?

The Witness: No, sir. I could guess.

The Court: What would be your guess?

The Witness: As the crow flies I would estimate perhaps six to eight miles. Via streets—

The Court: You notice you have to go, if you go by [fol. 2387] Laurel Canyon, to get there—

The Witness: You have to go up to Roscoe, let's say.

The Court: All right. Now, are you familiar with the Chatsworth area?

The Witness: No, sir, I am not, especially.

The Court: Granada Hills?

The Witness: Slightly, Granada Hills.

The Court: I am sure you must be familiar with Vanowen, Sherman, Satcoy, and Roscoe, and Reseda, and that area, aren't you, Topanga?

The Witness: Reasonably.

The Court: Would you have any idea how far it would be in miles from Topanga Canyon to the star at point 22, let's say you went Sherman Way?

The Witness: I haven't found my starting point. Where am I, Topanga and Sherman?

The Court: Topanga and Sherman Way.

The Witness: I am sorry, I don't have a scale here, so I am only roughly estimating this, but I would guess—

The Court: Do we have a ruler here, Mr. Clerk?

The Witness: A ruler won't do any good, because we don't have a convergent scale, anyhow. But I would estimate, starting from Topanga Canyon to the star at 22 would be about four miles, perhaps, between four and five, I would estimate.

The Court: How far would you say it would be from [fol. 2388] Tarzana to this Von's Market at Sherman Way and Reseda?

The Witness: From Topanga to the Von's Market at Sherman Way and Reseda, that is the star at 22, the Von's Market?

The Court: Yes.

The Witness: You said from Topanga and Sherman Way?

The Court: No. From Tarzana now.

The Witness: I am sorry. I don't see Tarzana here.

[fol. 2389] The Court: Tarzana is down at the very bottom.

The Witness: Oh, yes. Again, recognize, please, this is an estimate—

The Court: I understand it is an estimate. I am coming to something. I want to ask you a question.

The Witness: It would look to be two to three miles.

The Court: Now, do you know how many grocery stores

are in the area of Reseda, Vanowen, Sherman Way, in that area—do you have any idea how many grocery stores are there?

The Witness: If you want me to guess a number, I have the impression that that area is pretty well loaded with supermarkets.

The Court: There are not only supermarkets, but you have a great many independents in there, don't you?

The Witness: Yes, that is a pretty heavily saturated area, as I recall.

The Court: Do you think you could go five blocks without running into a grocery store?

The Witness: Not on a main—well, possibly, but I doubt it. I do know there is a little stretch here on Ventura where you just hit one after the other.

The Court: So that particular area surrounding point 22, as you put it, is pretty much loaded with all types of [fol. 2390] grocery stores, both chains and independents?

The Witness: Yes, sir.

The Court: How about up in—you say you haven't been in the Chatsworth area?

The Witness: Only once or twice.

The Court: Have you been up in Alhambra, up in area No. 3, which is Alhambra, up in that area?

The Witness: Yes.

The Court: I will put this in sort of—this may sound a little tricky to you, but you clarify it. Have you been any place in all your life and seen as many grocery stores as you see in that area?

The Witness: It is, as I recall, pretty heavily loaded, also. I think there are other areas that are more saturated in Southern California, but it's heavy.

The Court: All right. Where would be the area that you recall that would be more saturated?

The Witness: I could be wrong on this by actual count, but I would say that the general Crenshaw—Crenshaw Shopping Center and within a five- or six-mile radius of that location is pretty heavily saturated with markets.

The Court: As a matter of fact, Dr. Jenssen, that Crenshaw area has mushroomed not only in population, but in new stores, hasn't it?

[fol. 2391] The Witness: In how long?

The Court: Crenshaw, say, to LaBrea, through there, the freeway, all that new development in there, in the last 10 years.

The Witness: Yes. I think the bulk of the markets might have been there 10 years ago. The area has grown vastly in terms of population.

The Court: From your knowledge, do you know whether or not—this may be going outside of the direct, counsel, so if you want to stop me, object.

Have you noticed the development of independent grocery stores in that area, or are there any there?

The Witness: There are always independent grocers everywhere.

The Court: All right.

The Witness: I don't think that the Crenshaw area has any more than its normal share.

The Court: Go ahead, counsel.

By Mr. Coyle:

Q. Dr. Jenssen, have you made any studies as to whether a shopper will pass grocery stores to get to one that she prefers to shop at?

A. Yes, we have, Mr. Coyle. I mentioned before that there are a number of factors that influence where a shopper will do her shopping. I don't know if you want me to begin developing a list of these, but we have identified [fol. 2392] in our studies at least eight or ten significant elements that determine where she would shop.

The Court: Can you just list them?

The Witness: Not in rank order, but just some of the considerations: Pricing, general appearance of the store, size of the store, variety of brands, parking space, whether or not the store is in a shopping center or is a free standing store, general familiarity with the store's name; trading stamps used to be a factor, except now by and large they are pretty well equalized; quality of meat, quality of produce, variety of produce, check stand service, cleanliness of the store. These are a few that come to my mind. I might be overlooking some. I am sure I am overlooking some. These would be some of the more significant.

In her quest to—to what? Put together the optimum com-

bination of factors to best satisfy her home shopping needs, it is not all all uncommon for a shopper to pass one, two, three, four or five or more stores on her way to the particular store in which she is going to stop at that particular time.

There is, also, a great shifting in shopping behavior. A person who shops at a Alpha Beta, say this Friday, may next Thursday shop at a Ralph's, may split her shopping between a Ralph's and Food Giant. Multi-store shopping is very common.

[fol. 2393] The Court: What kind?

The Witness: Multi-store. If I may put actually the reverse of that. Very few homemakers in the Southern California area are loyal to a single store. Actually we arbitrarily for years have used the term 85 per cent of her shopping as being the break-off point. Anything beyond 85 per cent of her shopping—we call that shopper loyal to a single store. In terms of pure, pure loyalty, where she shops only in one store, even does 95 per cent of her shopping at a single store, these cases practically never exist. I would estimate—I would recall that at least 15 per cent of the shoppers in Southern California regularly, without fail, patronize as many as five, six, seven or more stores in a typical month.

The Court: Do they go to the other stores just because of the name of the store, or for some other reason?

The Witness: The name is one of the factors. They also, of course, read the advertising, they also have exposed themselves to the store, they have developed impressions of it. Name is an important factor.

By Mr. Coyle:

Q. By "name" do you mean reputation or image?

A. If I may, I would like to use the term "image."

Q. Pardon?

A. Image of the store.

[fol. 2394] Mr. Coyle: I have no further questions, your Honor.

The Court: I think we had better take a recess.

How much cross do you think you will have, counsel?

Mr. Alsop: I would think 20 minutes, your Honor.

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The Court: I am afraid that you gentlemen are going to have little or no time left for any extemporaneous speaking that you may have in mind.

Is this the last witness?

Mr. Coyle: Yes, your Honor.

The Court: I take it this will conclude the case?

Mr. Alsup: Your Honor, I would like to cross examine the witness, and I would like to recall Mr. Von der Ahe very briefly with respect to this witness' proposed exhibit.

The Court: What is this, surrebuttal, counsel?

Mr. Alsup: Yes, Your Honor.

I might say, your Honor, we weren't furnished with an affidavit of this witness.

The Court: You weren't?

Mr. Alsup: No, your Honor?

The Court: Why not, counsel?

Mr. Coyle: Because this is a rebuttal that we worked up, we decided to put on because of the ruling on paragraph 46.

[Col. 2395] The Court: I think probably technically you are within your rights. On rebuttal it may well be that that could not be within the spirit of the court's ruling. So if you desire to put on some surrebuttal, how much will it be, counsel?

Mr. Alsup: It will be very limited, your Honor.

The Court: All right. We will take a recess of 10 minutes.

(Recess taken.)

[Col. 2396] Cross-examination.

By Mr. Alsup:

Q. Dr. Jenssen, can you tell us when Exhibit S5 for identification was prepared?

A. It would have been roughly March, April, May of '60.

Q. Of 19-what?

A. 1960.

Q. When did you begin work on this case for the Government?

A. As I recall—

Mr. Coyle: If your Honor please, I think the witness could be refreshed. I think it is '61.

The Court: Counsel, you are not testifying. He is the witness.

The Witness: I might—

The Court: Did you make this yourself, this 85?

The Witness: Not personally by myself, sir, no. Perhaps I now misunderstood the question.

We began working—

The Court: He asked you when you, as I understood the question, when this chart was made, Exhibit 85. Is that right, counsel?

Mr. Alsup: That is correct, your honor.

The Court, You said 1960.

The Witness: May I place the date this way: We began [fol. 2397] working with the Justice Department in this study beginning the driving times early in 1960. Our first contact was in March of 1960. We began work early in 1960.

The interviews that were done with people who resided in these areas were done very early in 1961.

By Mr. Alsup:

Q. And if this map were furnished to us, this proposed exhibit, some time in December of 1961, would that refresh your recollection as to when it was prepared?

A. No, sir, this would not help. If it—if it is important to do so I can contact some of the people in my office who worked on the preparation of this exhibit and get their recollection of it.

The Court: Well, counsel, you were preparing for rebuttal awfully early, weren't you?

Mr. Coyle: Your Honor, we were preparing prior to the entry of the pretrial conference order.

Mr. Alsup: And after, I believe, your Honor.

Mr. Coyle: No, your Honor, this witness finished his work prior to the pretrial conference order.

The Court: You know, I allowed this to go in on the theory it was rebuttal. And at the time I had a little question in my mind about it being rebuttal.

What does it rebut? Who?

Mr. Coyle: It rebuts this evidence that the defendant [fol. 2398] put in that only 13 of the stores were competing. It shows that substantially more than 13 were competing.

The Court: You mean this exhibit shows that?

Mr. Coyle: Yes, your Honor.

The Court: Have you ever arrived at your understanding on this paragraph 46?

Mr. Alsup: I think we are very close to it, your Honor.

The Court: Well, time is moving on, you know, gentlemen.

Mr. Coyle: I think we have arrived at it, your Honor.

The Court: Because I will tell you this, this chart—while it is admissible in evidence,—it certainly creates some real problems when it comes to evaluating its weight.

You know the visual can create an impression that doesn't exist. It is like a mirage, you think you see something and you don't.

Now, these distances here by minutes, I don't know, I assume it has some value as evidence. But it is like trying to figure out what you would do if you were a woman going to a grocery store. That is pretty difficult for me to figure out.

Go ahead, counsel. I am going to let it stand in evidence, [fol. 2399] maybe it is rebuttal. It seems to me it was primary evidence.

Mr. Coyle: Your Honor, I don't believe so, not with the pretrial conference order standing as it was originally written.

The Court: Now, let's just back up, counsel. You are contending that as the pretrial order existed there was no issue then as to competition between the Von's and Shopping Bag, is that right?

Mr. Coyle: That is correct, your Honor.

The Court: Then why would you need this as rebuttal in 1961?

Mr. Coyle: It was original evidence then.

Mr. Alsup: It was furnished to us, your Honor, after the pretrial conference order was entered. That is the point I was going to make.

The Court: Then it was furnished to you, you have seen it then.

Mr. Alsup: I have seen a different copy of this, but not their working papers or any affidavits. It was furnished to us after the pretrial order was agreed and signed.

Mr. Coyle: It was furnished with our exhibits, your Honor.

The Court: You say you have arrived at a stipulation [fol. 2400] on this paragraph 46 of the pretrial order?

Mr. Coyle: Yes, your Honor.

The Court: If you have, let's have it now before you go any further.

Mr. Coyle: Your Honor, the new version of paragraph 46 would read as follows:

"Prior to the merger the 20 leading chains of supermarkets in the Los Angeles metropolitan area were all a part of the retail grocery competition in the Los Angeles metropolitan area, and as such each of these chains competed with each other and with other corporations and firms engaged in the purchase, distribution and retail sales of groceries and related products in the Los Angeles metropolitan area. As a part of the competition the major chains, as well as other grocers, frequently responded to competitive practices originated by one or the other major chains. But defendants contend that competition between individual Von's and Shopping Bag stores was limited to those instances where a store of each company was so located that both could compete for some of the same customers. And defendants admit that in such instances the competition was intensive."

[fol. 2401] The Court: Is that your stipulation?

Mr. Alsup: That is our stipulation, your Honor, with one additional matter in paragraph 8, subparagraph—section 8, subparagraph 6 of the pretrial order, your Honor, we made certain reservations as to interstate commerce, and particularly as to the relevant section of the country. And we would want that reservation as to the relevant section of the country to apply to this new paragraph 46.

The Court: Is that where Judge Mathes wrote in—is that the same place?

Mr. Coyle: I think it is, your Honor.

The Court: What page is it on?

Mr. Coyle: It was the amended one—

The Court: It is on page 11, paragraph 6?

Mr. Alsup: Paragraph 6 on page 11.

The Court: Well, Judge Mathes wrote in there, "and

with respect to paragraph 17 and the past three above," is that the place you are talking about?

Mr. Alsup: Yes, your Honor. And I would like to——

The Court: I think you had better prepare a written stipulation so that it will be a part of the record without any problem, and put that proviso in your stipulation for an order of the court.

[fol. 2402] Mr. Coyle: I would suggest, your Honor, that we retype this pretrial conference order with these various amendments.

The Court: No, I am going to—well, you can do that if you wish, that is all right.

Mr. Coyle: Because it has been amended a couple of other times, too.

The Court: I think it might be a good idea at that. Suppose you do that. Suppose you retype it completely and then it will be in the final condition that we now have arrived at, is that right?

Mr. Alsup: Very good, your Honor.

The Court: Now, what this means I am not sure. I know I have heard it, but——

Mr. Coyle: I have a copy of it here, your Honor.

The Court: Give me a copy of it, because after several days' study I may understand it.

Mr. Coyle: One word is stricken there, your Honor.

Mr. Alsup: May I see a copy?

The Court: Well, what it goes all out to say is just about what I tried to say originally, there is general competition in the area.

Mr. Alsup: That is correct, your Honor.

The Court: That is about what it says, doesn't it?

[fol. 2403] Mr. Coyle: I would say that, your Honor.

The Court: Well, that is what I said at the very beginning. So we have now, after great, profound thinking, come back to the original proposition that there generally is competition throughout the metropolitan area.

Proceed, counsel.

By Mr. Alsup:

Q. Dr. Jenssen, you have been referring to some notes while you were testifying?

A. Yes, sir.

Q. What are those notes?

A. My definition of "regular, frequent——"

The Court: Whose notes are they, I guess is what he means.

The Witness: Oh. They are my own, on index cards.

By Mr. Alsup:

Q. Your definition of "regular"?

A. "Frequent, occasional shopping," as we defined it in our interviews with—which we conducted. Also a breakdown by areas of the data that we received.

I have a few other notes here, the fact that 16 Von's and 21 Shopping Bags were involved——

Q. May I see those notes, please?

A. Surely.

[fol. 2404] The Court: Step right up, counsel.

(Witness hands documents to counsel.)

By Mr. Alsup:

Q. I will ask you to refer to those notes, Dr. Jenssen, and tell me how many persons were interviewed in area 1 shown on Exhibit 85.

A. May I refer to——

The Court: You can refer to anything.

The Witness: Thank you.

The Court: That will refresh your recollection.

The Witness: Areas 1 and 2 we interviewed together. Area 1 and 2, the total number of interviewees were 202, which probably——

The Court: Now let me ask you a question.

The Witness: Yes, sir.

The Court: Is this refreshing your recollection or are you reading from something?

The Witness: No, I am reading from my notes.

The Court: Well, first, do you have any independent recollection at this time, without looking at your notes?

The Witness: Yes. As a general rule the interviews were dealing with six sub-areas here. The interviews per sub-area in no case were less than 100 and in a few cases were as much as 200.

[fol. 2405] The Court: But my point is this, simply, just to find out if you are actually refreshing your recollection and it is now refreshed from reviewing your notes, or whether or not you have no recollection and you are just reading your notes. There is a big distinction. Do you follow me?

The Witness: Yes, sir, I guess I do. Remember, we did these two years ago.

The Court: In other words, it is coming back to you now that you have looked at your notes?

The Witness: Yes, sir.

The Court: Go ahead.

By Mr. Alsup:

Q. That is, you interviewed approximately 200 out of the estimated total population in those areas of 200,000?

A. Yes, sir.

Q. And how many persons did you interview in Area 3?

A. In Area 3, 232.

Q. 232 out of a total population of 380,000?

A. Yes, sir.

Q. How many persons did you interview in Area 4?

A. 373.

Q. 373 out of a population of 262,764?

A. Yes, sir.

Q. Was there any reason, Doctor, why you should interview more persons in Area 4 than you did in Area 3, when Area 3 has a greater population than Area 4?

[fol. 2406] A. Yes, sir, there is.

Q. Will you explain it, please?

A. Yes. Recall that the purpose of these interviews was to positively verify for us that the homemakers living in these particular areas, which we had outlined, were not an exception to the general rule we had found to exist over-all throughout the Southern California area——

Q. In other areas, Doctor, though, when you are making studies for grocery concerns, what are those for? To determine whether or not a store can improve its image, or whether it should build a new store, something like that?

A. Yes. In many areas, by way of a general answer, we are concerned with conveying to the retail food operator

the shopping needs, desires, habit patterns of homemakers in his area.

Q. In those instances when you are employed by someone like Ralph's, for example, would you start out at the parking lot of some store in the area and drive for ten miles in each direction and come back and tell Ralph's they could either have a good store or not a good store—would you make a recommendation to them on that basis?

A. On that basis alone?

Q. On that basis alone.

A. No, sir.

[fol. 2407] Q. What other factors would you take into consideration?

A. To answer that thoroughly, I would have to describe for you the method we generally use in appraising a store site.

The Court: You can give the method later on, but what factors would you take into consideration?

The Witness: Consumer shopping behavior in the area.

The Court: Which includes what?

The Witness: It includes the stores at which persons in that area currently are shopping, and the degree of satisfaction or dissatisfaction that they are receiving from their shopping at these particular stores.

By Mr. Alsop:

Q. Isn't it true, Dr. Jenssen, that you have performed certain studies for Shoppers Markets?

A. Yes, as I recall, a number of years ago we did.

Q. In that case in determining the competitive effectiveness of the Shoppers Market—let's take the one in Norwalk—did you interview a percentage of homemakers within a one-mile radius of that Shoppers Market?

A. This could be. I don't recall.

Q. Hasn't that been your general practice in making these studies for your grocery store clients?

A. No, sir, it has not.

[fol. 2408] Q. How far out do you go—

A. This is what I started to answer.

Q. —in making these interviews?

A. When we go into an area we are never too sure ex-

actly how far—what the trading area of that particular location is going to be. Consequently, as a very early step we will go out a distance of 10, 15 minutes driving time, which normally might represent as far as three, four, and in some cases even farther miles from the site. Then we will begin interviewing persons around the periphery of this rough circle. As we move in toward the circle, normally at this point people in performing their shopping tend to be moving in other directions. At some point as we move into the circle we will find that people are in general trending in the direction, the general direction of the proposed site. This, then, becomes our outer boundary. In many instances a this has been as little as one mile; in other instances a mile and a half; in other instances it may have gone out as far as three or four miles.

Q. I show you a document, Dr. Jenssen—

Which I asked be marked Defendants' Exhibit next in order for identification.

The Court: What is it, Mr. Clerk?

The Clerk: Defendants' Exhibit BJ, your Honor.

[fol. 2409] (The exhibit referred to was marked as Defendants' Exhibit BJ for identification.)

By Mr. Alsup:

Q. Can you identify Defendants' Exhibit BJ for identification, Dr. Jenssen?

A. Yes, sir.

Q. Will you state for the record what it is?

A. It looks to be what I would term an image study—

The Court: What kind of a study?

The Witness: An image study of the Shoppers Market in Norwalk.

By Mr. Alsup:

Q. When was that made, Dr. Jenssen?

A. I don't see a date on here. I could roughly estimate from the cover. Let me think for just a moment, if I may, please.

I would guess about six or seven years ago.

Q. That was made by you or your organization?

A. Yes, sir.

Q. I ask you to turn to page 5 of that exhibit, Dr. Jensen. Does that indicate that within a one-mile radius of that Shoppers Market in Norwalk there were then an All American, a Raisin's, an Arvo's, a Market Basket, a Ralph's, a Wong's, a mom-and-pop's?

A. Yes, sir.

[fol. 2410] Q. Do you know of your own knowledge whether or not there are now additional stores in that Norwalk area?

A. I couldn't name them specifically, but I am confident there are.

Q. Does page 5 of that Exhibit BJ, for identification, indicate that Shoppers at that time in competition with these other grocery concerns had 42.3 per cent of the business in that area within the mile radius?

A. Yes, it does.

Q. Turn to page 7, please, Dr. Jensen. Does that indicate that 67 per cent of the Shoppers Market customers of that store came from a one-mile radius, and a total of 93 per cent came from a radius of two miles?

A. This is where?

The Court: Page 7, he said.

The Witness: I have no page 7. Is it headed Statistical Data?

Mr. Alsop: Yes, it is. It is the page that follows 6. It is unnumbered.

The Witness: Right.

Would you repeat your question, please?

Mr. Alsop: Yes. Does that page indicate that 67 per cent of Shoppers Market's customers came from a radius of one mile?

The Witness: Yes, sir.

[fol. 2411] By Mr. Alsop:

Q. And does it indicate that 93 per cent of the Shoppers Market customers came from a radius of two miles? That takes a little adding.

A. I have six per cent of that store's volume at that time as coming from beyond two miles. 94 per cent of that Shoppers Market's volume at that time was coming from within two miles.

Q. I will accept that, Dr. Jenssen. And you assume that since that time other concerns have moved into the area. In your experience, Dr. Jenssen, as a marketing consultant and student of the industry, when new stores move into the area does that enlarge or decrease the draw area of a grocery store?

A. This would depend, frankly, upon the stores that moved into the area. It could happen either way. If a number of pretty good, well-operated stores, moved into an area, it tends to—going back before to our comment about a shopper passing three, four, five, six stores in order to arrive at the store at which she is going to shop—obviously the more of these she has to pass, the more freedom of choice she has, the more likely she might, indeed, be to peel off before reaching a store farther away. In a case like that it would, of course, tend to restrict the trading area.

In other instances, a store might be established in an area and be such a strong store, such a good store, well-[fol. 2412] known store, that it might, indeed, begin to draw persons from outside what was the normal trading area before.

Q. Are you thinking of a store like Gelson's?

A. Gelson's I know has had this effect, yes.

Q. Are you acquainted with W. H. Crawford at Five Points in El Monte?

A. Yes, at one time I think the Crawford store had that effect. I think this is no longer true.

Q. Are you thinking of the New Continental store of Piggly-Wiggly?

A. I would presume this store has had this type of effect.

Q. This is the type of store you are talking about?

A. This is an example of the type of store.

Let me answer the question this way: Yes, this type of store, the elegant, exotic, interesting kind of store most always would have this effect. It is not the only kind of a store that could have this effect.

The Court: By "this effect" you mean—

The Witness: Drawing persons from a farther distance than had been drawn previously.

By Mr. Alsup:

Q. In the business it is generally recognized that there is a great distinction between the effective draw area of a store and draw area as such, isn't that true, Dr. Jenssen?
[fol. 2413] A. I don't know if I follow your terms precisely. If you want to tell me——

Q. Let's take this Shoppers Market example, you would say in that case where 94 per cent of the customers come from within a two-mile radius——

A. His effective draw area at that time for that store would be about two miles, yes.

[fol. 2414] By Mr. Alsup:

Q. Now, you said you furnished these persons who went out to interview housewives in connection with this proposed Government's Exhibit 85 with a questionnaire?

A. Yes, sir, they had a printed questionnaire which they used.

Q. Do you have a copy of it with you?

A. No, sir, I don't.

Q. Was there any reason why you did not bring it?

A. Yes, there is. We don't have—we don't have any of them, any more. Recognize we do vast amounts of interviewing——

Q. You will have to speak up, Dr. Jenssen, I am having trouble hearing you.

A. We do vast amounts of interviewing, running in the neighborhood of an average perhaps of two thousand interviews a month. This creates a storage problem for us. It is our general practice to keep our interviews for one year after they have been completed, at which time we check with the client to see if he has any further use for these, and if not we discard them.

The Court: All of them?

The Witness: Yes, sir.

The Court: You don't even keep one single one?

The Witness: No, sir, in that——

[fol. 2415] The Court: I mean just from the standpoint of good business, don't you go back over your past history sometimes to study your methods to see if you can improve them and review what you have done in the past?

The Witness: Certainly, I question the extent to which our old interview ballots become of value to us——

The Court: Well, as a matter of research, if you want to go back historically you would have the record—not all of them, but just one interview would show you the type of interview you made for the last 20 or 25 years, isn't that right?

The Witness: I think I know pretty well the type of interviews—

The Court: Well, is your concern just you, are you the whole concern?

The Witness: No, sir, I am not.

The Court: Well, how about posterity, the other people that are going to follow you? What advantage are they going to have?

Mr. Alsop: Don't you think it would have been helpful, since you were going to be a witness in this case, Dr. Jensen, to have a copy, so that we might have an opportunity to determine whether or not, in our opinion, the questions were fair and called for fair answers?

The Court: Well, that is argumentative, counsel. You [fol. 2416] can ask him this, if he didn't think he should have preserved it, since the trial was imminent? The rest of it I think is argumentative.

The Witness: At any rate, after a year I did check with Mr. Coyle, asking did he have any particular need for us to preserve these. And Mr. Coyle indicated no, he did not.

By Mr. Alsop:

Q. When was that, Dr. Jenssen?

A. It would have been a year after the interviews were done. And the interviews were undertaken, as I recall, before, some time early in 1961. So this would have been probably January of 1962 that we checked with Mr. Coyle.

Q. Now, to the best of your recollection then, Dr. Jensen, what were the questions on this interview form?

A. The questions began with, first of all, an introductory statement from the interviewer to the respondent, to indicate—this is by and large our standard—

The Court: May I ask you a question?

The Witness: Sure.

The Court: Did you ever conduct one of these interviews yourself?

The Witness: Yes, sir.

The Court: All right. Go ahead.

[fol. 2417] By Mr. Alsup:

Q. Is that one of these referred to in the 1167 of the—

A. In almost all of our studies, before we go into a field of study I like to, if I can possibly manage to do it, conduct at least half a dozen interviews by myself to insure that we are going to get the kind of information that we were seeking.

The Court: That does not answer the question. The question was: Did you make any of these interviews yourself personally?

The Witness: Yes, I did.

The Court: You see how difficult it is now to get an answer to a question. In other words, that is the problem I had in mind awhile ago when I was asking you about the form of the question, because in this courtroom I have heard a man ask a person the way to Brooklyn and they tell them they own a yacht in Nova Scotia. The answers have no relation to the question. So that has been my problem to discern what the questions specifically were, if they were compounded, then you get one type of answer and if they were simple, direct questions seriatim 1, 2, 3, 4, then you get a different situation.

So I am sort of at a loss now to know what the questions were, how they were put and what the answers were.

[fol. 2418] The Witness: I could pretty well reconstruct the interview form, and the form of questioning as far as the data are concerned, I have a complete record of these.

The Court: Go ahead, counsel.

By Mr. Alsup:

Q. Isn't it strange, Dr. Jenssen, that you would save the data but not the question form?

A. On the contrary. Why would this be strange?

The Court: He is asking you. If it isn't strange, you can say so.

Mr. Coyle: I object, your Honor, that is an argumentative question.

The Court: Well, I am afraid it is. But—is this the usual

procedure—you anticipated being a witness in this case, didn't you?

The Witness: Yes, sir. But one point I think might explain this.

Recognizing doing a market research study for any client for any purpose, what we are after as an end result is the data.

In the case of shoppers, this report.

In the case of the Justice Department, the data that I have here regarding our findings.

The actual interview is a tool that we use to get the information. When the tool—when the information has been [fol. 2419] obtained and for our purposes there is no reason whatsoever to preserve the tools that are now out of date, once the data has been derived from them—particularly, as I say, in the case of interviewing—where we could easily accumulate 25 to 30,000 ballots usually which run 2, 3, 4 pages each, we have a difficult enough time preserving these for a year.

The Court: We are talking about one ballot, not preserving all of them, just one sample. That is what we are talking about.

What was the end result you were seeking?

The Witness: The end result we were seeking was the verification of what we knew to be true for Southern California as a whole.

The Court: And what is that?

The Witness: And this was that the bulk of shoppers regard any supermarket within an approximately ten to twelve-minute drive of their home as a logical place for them to consider shopping.

The Court: In other words, you were thinking to prove your point, is that right?

The Witness: No, sir, we had no point—

The Court: Well, your conclusion, as I understand it you say your conclusion was before you started this investigation was what you have just stated, is that right?

[fol. 2420] The Witness: We knew that persons in Southern California do this, namely—

The Court: That was your conclusion?

The Witness: That was our finding. The result of our finding.

The Court: And you were out to sustain that conclusion?

The Witness: We were out to assure ourselves that the findings which we had extended to specific areas, based on general Southern California data, that these findings did indeed prevail in specific isolated areas.

The Court: Do you think, in making an examination into any matter, or an investigation, that if you go into it to prove a certain thing that you have maybe a tendency to lead in that direction, sort of a predilection in a certain direction?

The Witness: I don't think, your Honor, that one in the business in which I am can afford to ever enter an assignment with a predetermined conclusion.

The Court: I don't mean that you are doing it deliberately necessarily, but don't you think that any expert, to some extent, might be influenced in the method of his investigation, if he has reached a predetermined conclusion? That is the point.

The Witness: You keep using the term "predetermined [fol. 2421] conclusion." Might I mention this, that had we—assume that our Southern California data applied—had we developed our configuration based on our general Southern California data, and let it go at that, probably everybody would have been happy.

To insure that what we were doing, that we were correct in what we were doing we sought merely to verify this by these additional interviews. The additional interviews really weren't even necessary.

The Court: Yes, but you overlook the fact, don't you, that I am the one who has to decide from your investigation how good your expert opinion is. And all this underlying data might be of great help to the court in making that determination.

You are coming into court on the theory that you are going to reach a conclusion, period. And the court accepts it. That is the trouble, isn't it? You might be mistaken in your conclusion. That is my job to determine, isn't that right?

The Witness: Yes, sir.

The Court: I am not saying you are mistaken, but every bit of evidence that one relies upon in arriving at an expert opinion may not necessarily help the judge of the facts, but it may help. That is the point. That is the problem.

[fol. 2422] Go ahead, counsel. I have interrupted several times, I am—I hope I am not throwing you off of your track.

Mr. Alsup: Not at all, your Honor.

The Court: But it presents a problem for the court.

Mr. Alsup: You were going to reconstruct the questionnaire. Can you briefly just state what the questions were?

The Witness: Yes. It started with a buffer introduction, "We are doing a study on retail foods—on shopping behavior."

Question No. 1: "At what stores do you shop regularly? At what stores do you shop regularly for food?" And by "regularly," we mean more than six times a month.

Respondent names the stores, they are written down.

"Where are these located?"

These are located—the respondent indicates either by an address or an intersection or other description, the location of these stores.

"At what store, do you shop at any additional stores for food frequently?" By this we mean anywhere from four to six times per month.

Respondent in those cases supplied additional stores.

[fol. 2423] Finally, "Were there stores, other stores at which you shop occasionally, in addition to these?" By "occasionally," we mean less than four times a month.

The respondent replies, supplies names and addresses of additional occasional stores.

Then the interviewer goes back and says, "Now, to help me locate these, could you tell me about how far these are, about how long it takes you to get to each of these stores at which you shop?"

The respondent supplies approximate times. The interviewer got the respondent's name, telephone number and I believe concluded the interview at that point.

The Court: May I ask, was there a report written up of all this?

The Witness: Yes, sir.

The Court: At some time?

The Witness: Yes, sir.

The Court: Where is the report?

The Witness: I have a copy here.

Mr. Alsup: May I examine it?

The Court: Yes.

(Witness hands document to counsel.)

By Mr. Alsup:

Q. May I ask, Dr. Jenssen, if this is the full summary of all the interviewed areas?

[fol. 2424] A. I believe so. May I check it over first, however, before—

Q. Yes, please do.

(Counsel hands document to witness.)

Mr. Alsup: I ask it be marked as defendant's next in order for identification, please.

The Court: May I see it after you mark it, please.

The Clerk: Defendant's Exhibit BK for identification.

(The exhibit referred to was marked Defendant's Exhibit BK for identification.)

Mr. Alsup: If your Honor please, we can arrange to get a photostat and return it.

The Court: May I see it a moment first?

(The exhibit was handed to the court.)

The Court: Very well.

The Witness: I believe this is complete.

Mr. Alsup: Your Honor, I am not sure I offered the prior one, which I marked for identification, I am not sure I offered it in evidence. I do offer that, and I offer this in evidence.

The Court: What prior one are you talking about?

Mr. Alsup: BJ, your Honor.

The Court: What is BJ?

Mr. Alsup: BJ was the study made by the witness concerning—with respect to the Shopper's Market which he testified to.

The Court: May I see it, please?

(The exhibit was handed to the court.)

The Court: Yes, that will be admitted. I take it there is no objection?

Mr. Coyle: No, your Honor.

The Clerk: BJ in evidence.

(The exhibit heretofore marked Defendant's Exhibit BJ was received in evidence.)

The Court: It is admitted.

The Clerk: You say you also offer BK?

Mr. Alsup: Yes, we offer this.

The Court: Any objection?

Mr. Coyle: I haven't seen it but there is no objection.

The Court: It is admitted.

The Clerk: Defendant's BK.

(The exhibit heretofore marked Defendant's Exhibit BK was received in evidence.)

By Mr. Alsup:

Q. Dr. Jenssen, you were asked by the Government attorney to determine the extent of overlap between the respective Von's and Shopping Bag stores that you checked, is that correct?

[fol. 2426] A. Yes. As I recall, the objective of the study we were asked to undertake was essentially this: To determine from how little or how small a geographic area both Von's and Shopping Bag stores could be expected—could reasonably be expected to draw customers.

The Court: Was this put in writing or just by conversation?

The Witness: I don't recall if we sent anything to the Justice Department in writing on that.

[fol. 2427] The Court: No. I mean did the request of what they wanted come in writing so you had a very specific matter before you as to what you were searching for, or did you just get it by conversation?

The Witness: The standard procedure on this is, and this is what happened in this case, I and several members of my staff met with Mr. Coyle and several other gentlemen from the Justice Department, discussed their objectives, and as I recall I think we then might have submitted a letter to the Justice Department saying, "This is how we propose going about what it is we discussed." So it would have come in writing, normally in writing from us to them.

I don't recall, frankly, if in this instance we put it in writing or not. I suspect we did.

By Mr. Alsup:

Q. I ask you, Dr. Jenssen, wouldn't the \$64 question, if you are going out to interview people to determine whether or not there was competition between stores—wouldn't the \$64 question have been, "Before the merger of Von's and Shopping Bag, what stores did you shop at?"

A. No, sir, it would not.

A primary basic, fundamental rule in market research is not to ask questions such as, "What did you used to do?" and not to ask questions, "What is it you propose to do in the future?" but ask questions regarding, "What are you [fol. 2428] doing right now?"

The Court: "What are you doing right now" involves yesterday and the day before and the week before that, which is in the past, doesn't it? What he is doing right now is sitting talking to your interviewer, isn't that right?

The Witness: Yes, sir.

The Court: So the question is how far back in period of time are you asking him to relate this question, the answer to this question? It is a matter of habit over a course of time, isn't it?

The Witness: (Shakes head.)

The Court: Your answer is "Yes"?

The Witness: Tell me again.

The Court: Read it to him.

(The record was read by the reporter.)

The Court: Meaning the customer, of course.

The Witness: Yes. And what I am saying is that market research people have relatively little confidence in a question in which we ask, "Where did you used to shop?" We have little confidence in a question such as, "Where do you think you will shop in the future?" The kind of question that is of interest to market research people is a question such as, "Where are you currently doing your shopping?" [fol. 2429] The Court: All right. "Currently doing" means over a period of time, in other words?

The witness: Yes.

The Court: Go ahead, counsel.

By Mr. Alsup:

Q. Changing the subject, Dr. Jenssen, do you recall writing back in November 1959: "While I've never been

particularly impressed with Shopping Bag, its union with heavyweight Von's nonetheless adds a little more strength to one of the Coast's outstanding operations"?

A. Food Mart News, I believe?

Q. Yes.

A. A column I wrote for Food Mart News at that time. Yes, sir, I do.

Q. Do you recall writing on September 16, 1960—

Mr. Coyle: If your Honor please, I object. This is outside the scope of the direct.

The Court: I thought this was proposed impeachment. Is that what you are doing, counsel?

Mr. Alsup: Yes, your Honor.

The Court: You can impeach a witness, can't you?

Mr. Coyle: Yes. But I don't see how this is going to impeach this witness, your Honor.

The Court: Maybe you don't and maybe I don't, but until I get the answers I will have to wait and see. But if it is [fol. 2430] on a collateral matter, he is bound by the answer. If it is not a collateral matter, then it is something different.

Mr. Coyle: I understand.

By Mr. Alsup:

Q. Do you recall, Dr. Jenssen, writing for Food Mart News on September 16, 1960, an article in which you stated: "The most evident influence is the never before equal degree of supermarket saturation that now prevails in the Southern California community. There is scarcely a household in the entire area which does not have at least three class A supermarkets within ready striking distance, plus anywhere from five to eight additional markets of smaller and/or older vintage"—do you recall writing that, Mr. Jenssen?

A. Yes.

[fol. 2431] Q. This was an article dealing with why customers sometimes shop at different stores, do you recall that?

A. The one to which you just referred?

Q. Yes.

A. You said it was in Food Mart News?

Q. The whys and wherefors of multi-store shopping.

A. I don't recall it, specifically. I remember the thought.

Q. Do you recall that in this same article you stated that there had been a failure "in many communities of any single retail food outlet to crystallize the unchallenged leader. Although each of the major Southern California stores has developed a very distinct image all of its own, none has emerged with a so completely positive over-all image that it overshadows all competition. Perhaps the single chain that currently comes anywhere close to possessing the best all-around image in the minds of the area's homemakers is Ralph's. A year or so ago Von's was in the top spot in this regard, but the Shopping Bag merger seems, strangely, to have weakened this chain's image, rather than to have enhanced it"—do you recall writing that, Dr. Jenssen?

A. What would the date on that be?

Q. September 16, 1960.

A. This, I presume, would have been after my comment about the possible new—

[fol. 2432] The Court: The question is, did you make that statement?

The Witness: If he has copies of this it would be helpful if I just took a look.

The Court: Let him look at it.

Mr. Coyle: If your Honor please, I object, again. I don't see how this relates to his studies—

The Court: I certainly think it does. It goes to the weight of his testimony. Here is a man saying, in effect, that competition exists between stores of Von's and stores of Shopping Bag, and now counsel is bringing in a statement, if he made it, that seems to contradict this.

Do you remember it?

The Witness: Yes, it is my column. I wrote the column.

The Court: That is your statement?

The Witness: Yes, sir.

The Court: Next question.

By Mr. Alsop:

Q. Do you recall, Dr. Jenssen, writing an article for the Food Mart News on July 17, 1959, in which you stated:

"Some of the historic antitrust actions in various industries have made a fair degree of sense. I'm quite hard put, though, to justify on a logical basis that big-business in the retail food industry is criminal. I doubt [fol. 2433] whether there is any other field of business in which the small entrepreneur holds a better competitive opportunity against the giant corporation. Against the burlesque statistics which the FTC and the House Small Business subcommittee have fished up, it should also be recognized that many small independents are doing a lot better, on a per store basis, than the biggies. In spite of advertising and buying deal advantages inherent to the mammoth chains, many small operators in their respective communities are whaling the daylights out of the A & P's, Safeways, National Teas, and Krogers. More than any other business, competition among supermarkets is strictly a community-level affair. Which explains the fact that every chain in the country—even the very best and biggest—has its share of individual stores that are 'dogs.'"

Do you recall writing that?

A. The date is what?

Q. July 17, 1959.

A. Yes.

Q. Do you recall in this same article writing:

"I doubt if it is possible today to scribe a one-mile radius circle into any populated area out of Southern California without finding it including at least good-[fol. 2434] sized, existing markets."

Do you recall writing that?

A. I think there was also more. I think "plus several smaller markets."

Q. That was in the prior article.

A. Right.

The Court: Do you want to offer these articles, or are you just using it for impeachment purposes?

Mr. Alsup: Just using it for impeachment purposes.

Q. Bringing to your attention Exhibit 85 for identification, in looking at Area No. 1, Dr. Jenssen, that lists a

Shopping Bag Store 42 immediately adjacent to a Von's Store 37. Do you know whether that Shopping Bag store was ever built?

A. To my knowledge it was not.

Q. Do you know who occupies that site?

A. No, sir, I do not.

Mr. Alsup: Can it be stipulated that is Food Giant, counsel?

Mr. Coyle: Yes.

Mr. Alsup: No further questions.

The Court: Is that all, counsel?

Mr. Coyle: Yes, your Honor. I offer this exhibit in evidence, your Honor.

The Court: It will be admitted.

[fol. 2435] The Clerk: Plaintiff's Exhibit 85 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 85.)

The Court: Step down.

Do you still wish to call rebuttal testimony? I don't want to preclude you, counsel, but we are going to finish today.

Mr. Alsup: If I could have five minutes, your Honor, just with reference to this.

The Court: You can have more time than that. I am not trying to cut your time out, but I do have a full calendar Monday morning, a trial Monday afternoon, a judges' meeting Monday afternoon, and cases set for trial on Tuesday.

Mr. Alsup: Your Honor has been very patient and I appreciate it. I am sorry I took so long.

The Court: That's all right, counsel. Everybody is entitled to cross-examine.

Mr. Coyle: If your Honor pleases, there is one thing. On the first day of the trial we indicated—the court ruled that certain affidavits would be read into the record. I think they probably should also be marked as exhibits. They were never marked as exhibits. So I ask that the affidavit of Gerald Harrison be marked as the next exhibit.

The Court: Whose affidavit?

[fol. 2436] Mr. Coyle: Gerald Harrison, an FBI agent.

The Court: That was to be read into the record—not read, but copied?

Mr. Coyle: It is already arranged that it is to be copied into the record. But we didn't mark them as exhibits. Since then we have marked everything as exhibits.

The Court: All right. It will be marked.

The Clerk: Plaintiff's Exhibit 86.

The Court: That is, in evidence, you mean?

Mr. Coyle: Yes.

The Court: In evidence.

The Clerk: In evidence.

(The exhibit referred to was received in evidence and marked Plaintiff's Exhibit 86.)

Mr. Coyle: The affidavit of Mr. Houghton as the next exhibit.

The Clerk: Plaintiff's Exhibit 87.

(The exhibit referred to was received in evidence and marked Plaintiff's Exhibit 87.)

The Court: You are listening, are you, Mr. Alsup? These are going in evidence. I hope you are hearing it.

Mr. Alsup: Yes, your Honor. I understood counsel was going to do this.

I made my objection the other day with respect to a portion of Dr. Mueller's.

[fol. 2437] The Court: What was your objection?

Mr. Alsup: The conclusions in the last two sentences. And your Honor overruled my objection.

The Court: I told you—I don't know that I exactly overruled it; I told you if it was purely a conclusion, unless it was expert opinion based on some ground, I would disregard it. That's what I said.

Mr. Alsup: That's right.

The Court: I thought you sort of acquiesced in that situation.

Mr. Alsup: I did, your Honor.

The Court: Very well. They will be admitted.

The Clerk: Plaintiff's Exhibit 86, an affidavit of Gerald Harrison; and the second exhibit admitted is Plaintiff's Exhibit 87, which is the affidavit of Harrison Houghton.

[fol. 2438] Mr. Alsup: That includes the certification also.

Mr. Coyle: And Mr. Alsup also referred to an affidavit you hadn't reached yet.

The Court: Well, reach it now, let's move.

Mr. Alsup: Let me list all of the affidavits, the affidavit of Thomas Linden will be the next affidavit.

The Court: Wait a minute, Let him mark them.

The Clerk: Plaintiff's Exhibit 88.

Mr. Alsup: Then the affidavit of John Marshall will be the next exhibit.

The Clerk: Plaintiff's Exhibit 89.

Mr. Alsup: And the affidavit of Dr. Mueller will be next.

The Clerk: Plaintiff's Exhibit 90.

Mr. Alsup: And the affidavit of Joseph DeSilva will be the following exhibit.

The Clerk: Plaintiff's Exhibit 91.

Mr. Alsup: Now I offer into evidence——

The Court: All of those are admitted, Mr. Clerk.

The Clerk: Admitted, 88 through 91.

(The exhibits referred to were marked Plaintiff's Exhibits 88, 89, 90 and 91 and received in evidence.)

The Court: Admitted.

The Clerk: Just to review them all, Plaintiff's Exhibits 86, 87, 88, 89, 90 and 91 in evidence.

[fol. 2439] Mr. Alsup: Now, with respect to Exhibit 87, to make it clear, there was a census certification attached to that exhibit. We ask that be admitted.

The Court: If it is attached to it it is already in evidence.

Mr. Alsup: Is it attached?

Mr. Coyle: It is attached, I believe Mr. Hughes mentioned that.

The Court: It is in evidence. Admitted.

Mr. Coyle: The original——

The Court: It is attached and admitted.

Mr. Alsup: That is all, your Honor.

The Court: Now, are these to be copied into the record?

Mr. Alsup: Copied into the record. That was arranged the other day, they would be copied in.

The Court: That is what I thought. Very well.

[fol. 2440] THEODORE A. VON DER AHE, recalled as a witness on behalf of the defendant, in surrebuttal, having been previously duly sworn, testified as follows:

Direct examination.

By Mr. Alsup:

Q. Mr. Von der Ahe, have you examined Government's Exhibit 85?

A. I have to some degree, yes.

Q. Can you tell us whether in your years of experience as a grocery man you have ever selected a store location based upon driving time?

A. We consider driving time, but we do not give it very much importance when we consider a market location. We do not feel that a market area can be defined in terms of miles or driving time.

Q. Would you look at Exhibit 85 and state your opinion as to whether or not this presents a realistic picture of the overlapping trading area?

A. In my opinion this definitely does not——

Q. Would you state your reasons?

A. —show an accurate, true picture of the overlap, if any, between any Von's or Shopping Bag markets.

I would like to refer, No. 1, to the area shown on Plaintiff's Exhibit 85 as area 1 and area 2——

[fol. 2441] The Court: Let the record show, I take it—the reporter or the clerk calls my attention to the fact that you did not indicate that you had rested.

Mr. Coyle: We rest, your Honor.

The Court: So this is surrebuttal that we are now proceeding on, is that correct?

Mr. Alsup: That is correct, your Honor.

The Court: All right. Proceed.

By Mr. Alsup:

Q. Will you continue, Mr. Von der Ahe.

A. Well, this is a very small map as depicted, it actually is the entire San Fernando Valley in which there are over a million people living there at this time.

Q. Can you give us some estimate of the number of stores in that area?

A. And it is heavily stored by markets of chains and independents alike. As a matter of fact, Dr. Jenssen, in his article, said you couldn't drive more than a mile without running across two or three very effective competitors and a lot of smaller ones.

But the point I wish to make here is that this map, while shown in small scale, covers very many square miles.

There is one Shopping Bag store at the corner of Tampa and Victory, which is at least a mile and a half from the nearest Von's at the corner of Reseda and Winnetka. There [fol. 2442] are many competing firms between those two stores.

The only other Shopping Bag store in the entire San Fernando Valley is in Sylmar, which is many miles away from any other Von's store.

So regardless of these configurations and things of that nature, Von's and Shopping Bag have never competed at all in the San Fernando Valley.

I think also, referring to this map, that area No. 3 shows there are nine Shopping Bag stores within that same area, or who are accessible to the customers in that area.

Now, I say that the management of Shopping Bag used a good judgment and prudence when they located those stores, and if they accepted the Doctor's theory, they would be putting stores——

The Court: Now, never mind, you are arguing now. Let's get back to the facts.

The Witness: I beg your pardon.

The Court: What I would like to know and what is going to help me is not the argument, but the distance between these stores and the relative competition. That is the thing that we are on, is that right, Mr. Alsup?

Mr. Alsup: That is correct, your Honor.

[fol. 2443] The Court: Now, I realize that you have to be a protagonist, this is your case. But I would like to get the facts.

Now tell me this, I would like to know in area No. 3—first, what is the closest two stores of Shopping Bag and Von's, in miles?

The Witness: Your Honor, the closest store would be about a mile and a half, in my opinion.

The Court: Is that the one in Monterey Park?

The Witness: That is the one at—

The Court: Wilma freeway?

The Witness: That we refer to, and you say it is bisected by the San Bernardino freeway, and there again are two distinct, separate shopping areas.

The Court: I was going to ask you, is there a throughway on any of those streets there?

The Witness: At Garfield there is a throughway, your Honor.

The Court: Now then, what is the next—do you mind, counsel, if I ask?

Mr. Alsup: No, I appreciate it, your Honor.

The Court: I am interested in these facts because I am not too clear.

Now, what is the next—let's see, in this area, in No. 3 on Exhibit 85, what is the next two markets, one of Von's and one of Shopping Bag, that are close together in miles? [fol. 2444] And how many miles?

The Witness: They are mentioning the West Covina district in area No. 6.

Mr. Alsup: He was referring to area 3.

The Court: Area 3, I am referring to area 3.

The Witness: Oh, I beg your pardon, sir.

The Court: Area 3, I want to find out what is the next closest two markets, one being Von's and one Shopping Bag.

The Witness: The only other market in that area is that star that is shown right here at Von's No. 4 (indicating).

The Court: That is over near where it says Pomona.

The Witness: Pomona Boulevard, yes.

The Court: That's right.

The Witness: Yes, your Honor. And that market is over the hill from the Shopping Bag No. 7. So there is a natural geographical barrier there.

The Court: Well, you can't get through, I take it, any of those streets except what?

The Witness: Garfield Avenue is one street and the other street is Atlantic Boulevard.

The Court: In other words—

The Witness: There is no other street.

[fol. 2445] The Court: This shop, where does it draw its customers from, Belvedere Gardens, in that area, or where?

The Witness: No, your Honor. There is a cluster of new homes being developed on both sides of Atlantic Boulevard, back to the east principally.

The Court: All right. Now, what is the distance between the Shopping Bag shop up in Monterey Park, I guess it is, and the one here at the Von's that we are talking about on Pomona Boulevard?

The Witness: The distance would be, I would say three or four miles. I am guessing. But I am saying that because of the geography, the fact that they come over the hill, get on the high speed highways, the people do not travel from one area to the other.

The Court: I will have to take about a three-minute recess, Mr. Alsup. We will adjourn for five minutes.

(Short recess.)

The Court: Proceed.

Mr. Alsup: Q. Mr. Von der Ahe, would you run hurriedly over the other areas, please?

The Witness: Your Honor, I will do this just as fast as I can.

The Court: Well, I don't want to hurry you, I am not in that much hurry. What I would like to suggest, if you do it by a process of elimination, tell me in the other areas what [fol. 2446] are the closest, what is the shortest distance between Von's and Shopping Bag, just take those.

The Witness: Take area No. 4, your Honor. The distance is approximately two miles, and the area which is served by the Von's store is definitely bound by barriers, a river to the west, a freeway to the north, a high speed boulevard, Lakewood, to the east, and Firestone to the south. Our pin studies show that that is all of the area we service there.

The Court: Now, you are talking about area what?

The Witness: Area No. 4.

The Court: All right.

Mr. Coyle: If your Honor please, I wonder if he would indicate which store he is talking about.

The Court: Well, I think that the record speaks for itself, but go ahead. You are speaking of the closest, are you, or the farthest?

The Witness: I am talking about the two closest stores, the Von's and the Shopping Bag.

The Court: In the area 4?

The Witness: In area 4, which is known as star No. 5 and Shopping Bag No. 34.

The Court: In other words, there are only two stores in that area, that is as far as Shopping Bag and Von's are concerned?

[fol. 2447] The Witness: That's right.

Mr. Coyle: On my copy, your Honor, there is a 27 and a 1 also.

Mr. Alsup: That is over near——

The Court: Where, counsel? I don't see it. Oh, I see, you mean over at——

Mr. Coyle: Yes, your Honor.

The Court: Where, I don't see it.

The Witness: He is referring to Lynwood.

The Court: Is that—Lynwood, is that in shopping area 4?

Mr. Coyle: On this exhibit that I have, maybe we have an old copy.

The Court: It is not in the circled area, it is not in area 4 here.

Mr. Alsup: It looks like it on my copy, your Honor, but area 4 looks closed there because we have got an arrow on there. Mine looks like a Rohrshach test or something.

The Court: Take a quick look at mine and see if they are the same.

Mr. Coyle: This is all one.

The Court: I see. It is all one.

Mr. Coyle: Yes, your Honor.

[fol. 2448] The Court, Go ahead. Then what is the closest, you say, between the Shopping Bag store and a Von's store in area 4?

The Witness: The closest would be between the Shopping Bag No. 1, which is incorrectly marked on this map to give the illusion of being closer to Von's 27 than it actually is, the distance is about two miles.

The Court: What is the distance from 27, the star, rather, at 27, to the one marked 2?

The Witness: The distance there is about $2\frac{1}{2}$ miles, your Honor.

And in that connection I would like to make this observation: That this is the store which we replaced with a new, larger unit, because we did not consider that that store was competing with the Von's No. 7 indicated by a star.

Mr. Alsop: 27.

The Court: 27.

The Witness: Von's No. 27, indicated by that star.

Also, in this connection, immediately south of that Von's No. 27 at Imperial Highway and Santa Gertrudes, we have put in another Von's store, because we, again, considered that it was another separate, distinct shopping area, which we could successfully service with a store, and we have [fol. 2449] done so. So in our opinion these stores are not competing with each other. We are competing with the customers in that neighborhood and we have felt that we needed that many stores to adequately service that area.

In area No. 6, if I may jump to there—

The Court: Yes.

The Witness: —there is a Shopping Bag store indicated at No. 12—32, I am sorry—and that is in a large shopping center right on the freeway. It has access to population north of the freeway, and also south of the freeway.

The Court: Which side of the freeway is it on?

The Witness: It is on the south side of the freeway. It competes to a degree with a Von's No. 31, but this map does not show all of the territory east of Von's No. 31, which is the major draw area for Von's No. 31. We attract customers principally from the east and that area.

The Court: What is the distance between those two stores, again?

The Witness: About a mile and a half or two miles driving.

The Court: What is the distance between 31 and 20? Is that what it is?

Mr. Vaughn: 28.

The Witness: 28, your Honor. That, again, is about two [fol. 2450] and a half miles.

Between those two stores are several chain stores and

several independents, and the character of the neighborhood does change to where No. 28 is servicing the area principally south and to the east and west of it.

Q. By Mr. Alsup: Is this the area you testified a lot of discount houses entered?

A. This is the area which is overrun with discount houses. As a matter of fact, there are seven or eight discount houses operating out in this West Covina area.

Quickly jumping down to area No. 5, your Honor, Von's have a store, as indicated there at No. 26, and the Shopping Bag store is indicated one mile to the north at Cotilla and Brookhurst, but that store also indicates that it competes with a Food Giant, a Thriftmart, and a Safeway, all closer to it than the Von's No. 26.

The Court: That has become a rather populated area, hasn't it?

The Witness: It has become very populated. More stores all the time are continuing to move into that area, principally farther down into Fountain Valley and the rest of Orange County.

By Mr. Alsup:

Q. Shopping Bag 33 is the one you testified yesterday never got off the ground, or words to that effect?
[fol. 2451] A. That's correct.

The Court: What do you mean, it never came into existence?

The Witness: It is in existence, but it was contemplated as a shopping center, and the rest of the shopping center failed to materialize and it never was developed.

Mr. Alsup: No further questions, your Honor.

Mr. Coyle: I have some questions, your Honor.

The Court: I hope that you gentlemen don't meet any of these clerks, bailiffs, reporters, or attaches of this court here in the hall, as here it is Friday evening after 5:00 o'clock and we are still in session. You may not get a smile.

I am not meaning to hurry you any, counsel. You go right ahead with your cross examination.

Mr. Coyle: I will.

Cross examination.

By Mr. Coyle:

Q. Referring to area No. 6, Mr. Von der Ahe, what did you say the distance was between Von's 31 and Shopping Bag 28?

A. I believe I said about two miles.

Q. Between Von's 31 and Shopping Bag 32?

[fol. 2452] A. There, again, I think I said a mile and a half to two miles.

Q. You said two miles on the other one, didn't you?

The Court: Yes, he said two miles.

By Mr. Coyle:

Q. How did you ascertain this distance?

A. I am making guesses from the map, sir.

Q. This professor that you sent out to interview the store managers when you prepared the answer to the interrogatory that was admitted in evidence yesterday as a defense exhibit, did he make driving time tests, or how did he test the distances that he put down?

A. I don't know.

Q. He didn't just guess, did he?

A. I don't know.

Q. He showed the distance between Von's 31 and Shopping Bag 28 was one mile.

Mr. Vaughn: Where is that, counsel?

By Mr. Coyle:

Q. Between Shopping Bag 28 and Von's 31 is one mile, in Exhibit AV, defense Exhibit AV, the portion marked Exhibit 3, the sheet referring to Shopping Bag No. 28. He shows that the distance is one mile.

A. Mr. Coyle, I can't quarrel with that. I am making guesses from the distance here, but it is my feeling that it [fol. 2453] is more than one mile.

Mr. Alsup: Perhaps we can shorten it, your Honor. The exhibit referred to indicates that the manager of the Von's store thought it was a mile and a half, and the manager of

the Shopping Bag store thought it was a mile. Obviously the professor was getting the opinion of the store manager as to the distance.

The Court: What did he do, split it in half?

Mr. Coyle: I don't know, your Honor.

The Court: As long as I understand the evidence. I don't think it is of that great moment.

Mr. Coyle: I think that all of these distances we have been getting here, though, are different than the distances on the exhibit, and substantially different than the distances on the exhibit already submitted by the defendant.

The Court: Go ahead.

Q. By Mr. Coyle: Referring to Von's 28 and Shopping Bag 27, how far is the distance there—29, I am sorry?

A. I was going to say you have lost me.

The Court: Where are we now, in area 4?

Mr. Coyle: Area 3 now.

The Court: In area 3?

Mr. Coyle: Yes.

The Witness: Will you repeat the question, please?

[fol. 2454] By Mr. Coyle:

Q. What is the distance between Von's 29 and Shopping Bag 27 in area 3?

A. Well, this is the one that was bisected by the freeway in Monterey Park—

Mr. Coyle: If your Honor please, he is not answering my question.

The Court: He can't find it, and I can't either. The markings on here are such that I can't tell.

Mr. Coyle: You can't find area 3?

The Court: I can find area 3, but I can't find these numbers.

Mr. Coyle: The star on Wilma freeway is Von's No. 29.

The Witness: I believe I estimated the distance to be a mile and a half.

By Mr. Coyle:

Q. And then between 27 and 29?

Mr. Alsup: 27 what?

Mr. Coyle: I am sorry. Shopping Bag No. 27 and Von's 29—

The Witness: I just estimated that.

By Mr. Coyle: -

Q. A mile and half. Then between Shopping Bag 27 and Von's No. 4?

A. I think I said three or four miles.

[fol. 2455] Q. Three miles or four miles?

A. I am venturing guesses by trying to estimate the distance as indicated on the map, Mr. Coyle.

Q. Then —

A. Of my own knowledge I cannot give you a specific answer because I don't know.

Mr. Coyle: If your Honor please, I move that this witness' guesses be stricken.

The Court: How far is it to your office, counsel, how many steps to your office?

Mr. Coyle: It is 3,000 miles away, your Honor.

The Court: I mean upstairs. Can't you give me an estimate?

Mr. Coyle: Yes, your Honor.

The Court: Well, that's what he is doing.

Mr. Coyle: All right. They are guesses.

The Court: All it is is an estimate.

Mr. Coyle: They are guesses.

The Court: It is an estimate. I can tell you how far it is from here to New York by flight, can't you, by estimate? But it surely wouldn't be accurate.

Mr. Coyle: It certainly isn't, that's the problem.

The Court: If we eliminate all testimony in this case that is not accurate, where will we be? It goes to the weight, counsel.

Mr. Coyle: All right, your Honor.

[fol. 2456] By Mr. Coyle:

Q. Then going down to Area No. 4, referring to Shopping Bag 35 and Von's No. 5, what did you estimate the distance there to be?

A. Two miles.

The Court: You see the problem, counsel—and I am not saying this to take sides with either one—the problem is that these dots are large, and in looking at the map they stand out in such perspective that they have a tendency to confuse. I am pretty good at distances, but the size of the markings have a tendency to dwarf the map to a certain extent.

Mr. Coyle: It is a problem you have in keeping the maps to a manageable size.

The Court: For example, that star, I would guess it to be a quarter of a mile across that star, at least.

By Mr. Coyle:

Q. Still in Area 4, Mr. Von der Ahe, referring to Shopping Bag No. 1, what would you estimate the distance between Shopping Bag No. 1 and Von's No. 27 to be?

A. About a mile and a half to two miles.

Q. Referring to Area 1, and referring to this Shopping Bag Store No. 42 up in Granada Hills, is that the store that was closed after the acquisition because it would have been in competition with the Von's store?

[fol. 2457] A. Mr. Coyle, that store was never built. We never closed it. This was proposed as a Shopping Bag store prior to the merger, and because of the merger, and because you can see that star and that dot are so closely together, that they would be serving the same area, we decided not to open that store as a Shopping Bag or Von's store, and we did arrange to have it go into the hands of Food Giant.

Q. But it was planned at the time of the acquisition?

A. That's correct.

Q. Referring to Area 2, could you tell us what the distance is between Shopping Bag 39 and Von's 22?

A. I believe I answered that by estimating the distance at a mile and a half to two miles.

Q. Mr. Von der Ahe, do you know whether these maps or this exhibit shows all the streets?

A. I did not prepare this exhibit. I can't answer that.

Q. From your knowledge of these areas, where you have stars does this map show all the streets?

The Court: Well, this is really not a map, is it, counsel? Is this a photographed map?

Mr. Coyle: This is superimposed upon a map, yes.

The Court: Is this actually a map of the San Fernando Valley? If it is I don't recognize it, because there are many more streets, I thought, than are shown on this map.

Mr. Coyle: That's the point I am trying to make.

[fol. 2458] The Court: What kind of a map is it when part of the streets are eliminated?

Mr. Coyle: The streets were eliminated for clarity. They were blacked out and only the main streets were shown.

The Court: Do you mean the darkness shall bring light? I see. All right.

Mr. Coyle: It would be even harder to read than it is now if we got every street in there.

The Court: It makes it very difficult, though, counsel, to estimate distances, because one experienced in measuring would know, with the streets in, how many blocks there are to a mile.

Mr. Coyle: That is true. It also doesn't indicate how much access there was—

The Court: That's right. And that is the reason I can't tell from the map what the access was. So you are relying upon what the witness answers.

Are you about finished?

Mr. Coyle: I have no further questions.

The Court: No more?

Mr. Coyle: No.

The Court: What are we talking about then?

Mr. Alsup: Defendant's rest.

The Court: You both rest?

Mr. Coyle: Yes.

[fol. 2459] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Step down.

(Witness excused.)

Mr. Alsup: Thank you for your courtesy in letting us go on.

The Court: Gentlemen, I don't want to linger on. I think we understand you have an order to prepare, and then I

believe you both decided that you did want to file additional memoranda. Am I correct about that?

Mr. Coyle: I don't think we have ever decided formally, your Honor.

The Court: What do you wish to do?

Mr. Coyle: Yes, I do.

The Court: It is entirely up to you. How about it, Mr. Alsup, do you want to file an additional memorandum?

Mr. Alsup: I would like to file a reply memorandum. I have submitted my summary, and if they would like to answer that, I would like a chance to reply.

The Court: Have you summarized all of the affidavits?

Mr. Coyle: Not yet.

The Court: I didn't think so. That is what you wish to do?

Mr. Coyle: Yes.

The Court: I think you have summarized all——

Mr. Alsup: All of them.

The Court: How do you want to arrange it? Do you want [fol. 2460] the Government to file first, and then you answer?

Mr. Alsup: I think that would be fair. They have had ours.

Mr. Coyle: I suppose we could reply, if necessary.

The Court: Of course.

I would like to tell you that I would like to get this case out of the way and have the findings signed in the early part of September, not later than the early part of September.

Mr. Coyle: Your Honor mentioned that we would probably submit proposed findings, both sides.

The Court: Do you wish to?

Mr. Coyle: Yes.

Mr. Alsup: Yes, your Honor.

The Court: They will be welcomed. They could be of great assistance to me.

Mr. Alsup: When would your Honor like those?

The Court: As soon as you can do it.

I think I will start to read on this case as I go along with the other cases, and as quickly as you can get your findings in I would appreciate it.

How soon do you think that would be? Do you have any idea?

Mr. Coyle: I could get them in in three weeks.

The Court: That is ample time, I am sure.

Mr. Alsup: We can certainly do that.

[fol. 2461] The Court: You don't have to answer each other's findings.

Mr. Alsup: No, no. It depends on getting the transcript, as your Honor would like transcript references, I am sure.

Mr. Coyle: That might be a problem.

The Court: Do it in your earliest possible time, counsel. I want to tell you now that I will not be here in October and November, so I would like to get this case so that you gentlemen can be struggling with it while I am away, get it in such condition that you will be on your way to wherever you are going, if you are going.

Mr. Alsup: Perhaps I could suggest this, your Honor, to expedite the matter: Rather than making transcript references, as to these affidavits that are going to be copied into the transcript—

The Court: You don't need transcript for that.

Mr. Alsup: We can start now doing it and making reference to the affidavits and the pages.

The Court: I would suggest you do that. Because in the final analysis all I need is the reference, where it is to be found, and I have the affidavits, and that will do it. So I don't think you ought to wait on the record.

Mr. Alsup: We will get ours in in two weeks.

The Court: And I will remember the testimony well [fol. 2462] enough, the oral testimony, well enough to know whether you are in bounds on your findings on that. I think I will. That has been written up, anyway. I will go to work on this case, begin to read and work on it, in the meantime, as soon as you can get in your memoranda and proposed findings.

Mr. Coyle: Does the memoranda come in with the proposed findings?

The Court: The memoranda comes in as soon as you can get it in. How soon will that be? I should think you probably would want to bring them in at the same time.

Mr. Coyle: I would say the same time, your Honor. Three weeks. That will give us a chance to go to Washington and do it.

Mr. Alsup: I will get my findings in in three weeks, and I would like 10 days to reply to their memorandum.

The Court: Very well. Counsel, you don't mean you are going to have them make the findings in Washington; you are going to do the findings yourself?

Mr. Coyle: Yes. We live in Washington. We will go back home.

The Court: How far is it to Washington, counsel?

Mr. Coyle: All I can do is estimate.

The Court: Anything further?

The Clerk: I don't believe it is clear. Plaintiff is going [fol. 2463] to file a memo, and then the defendant respond?

The Court: I am not pinning them down to exact dates, but, counsel, I understand you are going to file within three weeks, soon, or within three weeks?

Mr. Coyle: Yes.

The Court: Both the findings and additional memoranda?

Mr. Coyle: That's right.

The Court: Then, counsel, you will have—of course you will file your findings within the three-week period?

Mr. Alsup: Yes.

The Court: But you will have 10 days after the memoranda to answer it.

Mr. Alsup: Thank you.

The Court: Is that satisfactory?

Mr. Coyle: Yes. Then we will reply, if necessary, within five days.

The Court: In closing this case—the case will not stand under submission, however, until all of these additional memoranda are in.

And I want to say this, gentlemen: I thank you very much for the way that you have reduced this case down. Rather than having to sit down and read a record over again after hearing a long trial, it seems to me I am in position now to sit down and really read the record. I do [fol. 2464] appreciate the cooperation of both of you very much.

Mr. Alsup: We are very grateful to your Honor. I think your Honor's assistance has made this possible. I think it goes a great way to expedite it.

The Court: We can part at least on a friendly basis. Nobody has lost, at least up until now.

Mr. Alsup: That's right.

The Court: Do you want a closing time after reply?

Mr. Coyle: On the memorandum, I said, Mr. Alsup's memorandum, if necessary.

The Court: The way we are going, we will never close.

This, really, was nothing more than additional memoranda.

Mr. Coyle: That's why I don't see why he wants no reply. We are only going to be summarizing the witnesses.

The Court: That's correct.

Mr. Coyle: The evidence, I suppose.

The Court: I will tell you what I am going to do. I am going to shorten the time. I think you ought to both file a memorandum at the same time.

Mr. Coyle: I think so.

[fol. 2465] The Court: Why not, Mr. Alsup?

Mr. Alsup: I am willing. They have had our memorandum, which is a digest of all of the affidavits and the testimony of the witnesses, and if theirs proposes to be—

The Court: You do have a point. You have not had a chance to come back at their analysis.

Mr. Alsup: They have had ours. . . it is going to be a reply to it, it seems to me if I don't feel their analysis or reply is fair, I should be entitled to comment.

The Court: We are going to have some trouble with findings, you know that. If you want these findings to go over to December, and I am sure you don't, this delay may cause it. So I would suggest this, that you try to get your memoranda in before the three weeks, if you can.

Mr. Coyle: Very well.

The Court: Then we will reduce your time to 10 days, counsel.

Mr. Alsup: Very well.

The Court: To reply. And I would like, if you could, for you to get it in shorter than that.

Mr. Alsup: I am sure we can do it in a very few days.

The Court: And I will give you five days to reply to that if you deem it necessary.

[fol. 2466] Mr. Coyle: Very well, your Honor.

The Court: We will stand adjourned.

(Whereupon, at 5:20 o'clock p. m., court was adjourned.)

[fol. 2467] IN THE UNITED STATES DISTRICT COURT

Honorable CHARLES J. CARR, Judge Presiding

No. 336-60-CC Civil

[Title omitted]

Transcript of Proceedings—March 23, 1964

Place: Los Angeles, California.

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[fols. 2468-2469] APPEARANCES:—Same

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[fol. 2470] (Other court matters.)

The Clerk: Item No. 10 on the calendar, case No. 336-60-CC Civil, United States of America vs. Von's Grocery Company and others for further proceedings.

The Court: Gentlemen, I am going to have ample time to hear you out, and I have a lot of questions that I want to ask. So I hate to inconvenience you but I will have to ask you to remain. In due time we will reach you.

Mr. Coyle: Fine, thank you.

Mr. Vaughn: Thank you, your Honor.

The Court: We will probably continue over into the afternoon.

Mr. Vaughn: Thank you.

The Court: I would think you have no objection to arguing the case further, have you?

Mr. Vaughn: Not on behalf of the defendants.

The Court: All right.

(Other court matters.)

The Clerk: Item 10 on the calendar, case No. 336-60-CC Civil, United States vs. Von's Grocery Company for further proceedings.

The Court: All right. Now it's your turn, counsel. I want to ask you some questions when we get the [fol. 2471] appearances.

Mr. Coyle: James Coyle for the government.

Mr. Vaughn: William W. Vaughn and William W. Alsop for the defendants.

The Court: I believe Mr. Knight is also appearing.

Mr. Coyle: Mr. Knight also appearing for the government.

SUBMISSION VACATED

The Court: First of all, I have been over your—first, let's get the status. The status is now that the submission has been vacated for the purpose of hearing further from you and permitting stipulations, and also to hear argument.

Now, the next question that presents itself to me—before I bring that question to you—I have read the stipulation, studied it, I have read both of your briefs. And I would like first to know—I thought the issue in the pretrial order took out the issue of supplier in this case.

Mr. Vaughn: That is our understanding as well, your Honor.

The Court: How does the government now at this time start to argue that matter in the brief?

Mr. Coyle: I don't know what provision in the pretrial order took out suppliers, your Honor.

[fol. 2472] The Court: Well, let's get it and see. I thought it did. Am I mistaken about it? There is no evidence offered, as I remember it, on suppliers at all, was there, counsel?

Mr. Vaughn: Not to my recollection, your Honor.

Mr. Coyle: Yes, your Honor, on the evidence—all of these stipulations in the pretrial conference order related to the purchase, shipment and distribution of groceries and related products from outside the area into the area, and they raised those issues.

The Court: Well, first, let me say this. I had better first sign the stipulation. It is ready now for signing by the court, is that correct?

Mr. Vaughn: Yes, your Honor.

STIPULATION SIGNED BY COURT

The Court: All right. I shall now sign it. The stipulation is signed. Now, I am keeping my copy, which I have already marked up.

Gentlemen, now in the pretrial order I thought I re-

membered some statement regarding the supplier issue.

Mr. Vaughn: Your Honor, if I may, I think there is a statement on page 12, in the paragraph which commences on that page with the small letter (c).

The Court: Yes. Quoting on page 12, starting at line 1 of paragraph (c):

"Defendants assert that the Los Angeles Metro-[fol. 2473] politan Area is not the relevant section of the country as to wholesale purchases in the sale of groceries and related products.

"The government assumes no burden of proof as to the relevant section of the country, at the wholesale level since it intends to base its case on the proper effects of the merger in the relevant section of the country for grocery retailers, which is the Los Angeles Metropolitan Area. * * *"

Now, I don't remember, except incidentally in the testimony, where it may have come in sort of incidentally.

Mr. Coyle: Yes.

The Court: Any evidence as to the effect upon suppliers.

ARGUMENT ON BEHALF OF THE GOVERNMENT RE ISSUES

Mr. Coyle: May I call your Honor's attention to page 5 of the pretrial conference order?

The Court: Yes.

Mr. Coyle: Paragraph 16 therein.

The Court: Well, I am familiar with those things, counsel.

Mr. Coyle: They all relate to suppliers. This is a shipment of products into the area——

The Court: Well, I think you miss the point. The point is nobody is questioning that there is shipment of products into the area.

Mr. Coyle: Nobody is questioning, I don't believe, that these two chains merged and instead of there being two buying organizations, you have one.

The Court: No question about that. But it doesn't follow that they stopped buying the products from these others.

Mr. Coyle: It certainly follows that the suppliers that

were supplying both companies have only one company to supply now, because there is only one buying——

The Court: That certainly is true——

Mr. Coyle: That affects the suppliers, your Honor.

The Court: In what way?

Mr. Coyle: Because they have one possible conduit for their products instead of two. Some were thrown out.

The Court: Well, it is just the difference between one and two, but there is no evidence in the record to show any suppression of any suppliers.

Mr. Coyle: Certainly there was suppression of suppliers, their advertising was curtailed, railroad suppliers—you eliminated one railroad, that has an effect on suppliers.

The Court: It seems to me you have sort of backed in on that issue, haven't you, counsel?

Mr. Coyle: I don't think so, your Honor, no. It [fol. 2475] is just an obvious fact, any time you have a merger between two large organizations like that, it is going to affect the suppliers, it is going to affect the consumers, it is going to affect——

The Court: In what way, counsel? In what way?

Mr. Coyle: Because now you have one organization instead of two to deal with.

The Court: Well, those are effects that are obvious, of course, insofar as——

Mr. Coyle: Sure, sure they are obvious, that is why the suppliers were never out——

The Court: All right. Is that your position?

Mr. Coyle: That is the government's position.

The Court: All right. All right. Then I am disposed to view that in the light of, this is a sort of a backing in on the issue of suppliers, because it seems to me that from your pretrial order you were relying here upon the substantial lessening of competition in the area as between the actual stores themselves.

Mr. Coyle: But that lessening of competition in the area affected the suppliers, it affected the consumers. This blanket statement that the defendants want to make that we abandon the suppliers question just isn't true, because we have all these paragraphs of the pretrial conference relating to shipment of product through these [fol. 2476] conduits. That is the——

The Court: Counsel, you are talking in generalities. I am talking about what does the evidence show in this case.

Mr. Coyle: This is evidence, this is evidence, your Honor. This is in the pretrial statement. The evidence shows that they both——

The Court: I am not talking now about the pretrial, I am talking about the evidence. What evidence did the government offer on the effect on suppliers?

Mr. Coyle: Well, the pretrial conference order is evidence and——

The Court: Counsel, I am aware of these generalities, these glittering generalities, I am aware of them. But what I am asking is, what evidence was offered by the government on the question of suppliers. That is all I am asking.

Mr. Coyle: Well, these are not generalities. We offered Government's Exhibit 10 which——

The Court: I take it then none was offered, none was offered.

Mr. Coyle: No, your Honor, taking it from me because I am saying we offered specific evidence——

The Court: Where is it? Point the evidence out to me.

[fol. 2477] Mr. Coyle: Government's Exhibit 10——

The Court: Other than the pretrial order, point it out to me.

Mr. Coyle: I said Government's Exhibit 10, which is an answer to interrogatories which describes the shipment of groceries and related products from all over the country through the Von's and Shopping Bag organizations.

The Court: There isn't any question, counsel, that there are shipments in to grocers in this State from suppliers all over the country. There is no question about that. That isn't what we are talking about——

Mr. Coyle: And they are both——

The Court: How were they affected? What evidence is there as to how they were affected?

Mr. Coyle: They were affected because they only have one organization to deal with instead of two. That is not a bare generality, that is a fact. And it is in evidence just as strongly as any——

The Court: All right. Do you have anything further to say on that point?

Mr. Coyle: No, your Honor.

The Court: All right, fine.

Mr. Coyle: But it is not generalities, it is a specific fact in evidence in the most provable way possible in the pretrial conference order.

[fol. 2478] The Court: Counsel, nobody is disputing the general proposition that your pretrial order sets forth that the suppliers supplied these things and they came in to these purchasers, both of them. There is no disputing that.

Mr. Coyle: And also that the merger took place and the conduits were joined.

The Court: All right. I will hear from you. Do you want to argue the matter now?

Mr. Coyle: I am saying, what is there to argue? We do have suppliers in the case, we do have this paragraph in the pretrial conference order, we have the answers to the interrogatories, and suppliers are in this case. That is all.

But the lessening of competition is in the Los Angeles Metropolitan Area.

The Court: I thought the whole case was predicated on the probability of substantially lessened competition in this area.

Mr. Coyle: That is right.

The Court: To-wit: The grocery business in Los Angeles Metropolitan Area. I thought that was the basis of your case.

Mr. Coyle: In the entire grocery business, the grocery business in the Los Angeles Metropolitan Area is the [fol. 2479] buying, the distribution, the merchandising and sale of products. You can't separate one from the other.

The Court: Why can't you tell me then why the pretrial order did not set up a relevant trade area as a supply area?

Mr. Coyle: Because that is—these are two retail chains that merged.

The Court: I see. Well, I don't follow you, counsel. I just can't follow you at all.

I tried this case all along on the theory that your position with the government was that you were depending upon a substantial lessening of competition in this area, the relevant area, to-wit:—

Mr. Coyle: Resulting from the joinder of these two

chains. But we introduced plenty of evidence as to the nature of that competition.

The Court: Which competition are you talking about?

Mr. Coyle: The competition between these chains, as well as between other retail groceries.

The Court: We are jumping, we are skipping around all over the place——

Mr. Coyle: Your Honor, if your Honor will look at Government's Exhibit 12——

The Court: May I finish my statement, please, [fol. 2480] counsel?

Mr. Coyle: Yes, yes.

The Court: Let's slow down. We have all afternoon. Now let's slow down just a little bit.

I am trying to determine whether or not this issue is in the case. And my offhand impression is that it is not in the case, except in a general way, to-wit: that there were suppliers.

Now, I don't remember any evidence as to the effect on suppliers. Were any suppliers eliminated, other than the pretrial stipulation, pretrial order, that one purchaser took the place of two purchasers? Other than that?

Mr. Coyle: Well, sure, suppliers were eliminated.

The Court: Which suppliers were eliminated?

Mr. Coyle: Well, metropolitan newspapers. They only have one chain advertising now instead of two. That is an elimination of suppliers.

The Court: I don't know whether it is or not. It may be that they took out more advertising from those same newspapers——

Mr. Coyle: Just one advertiser.

The Court: Counsel, I wish you would let me finish my statement. Go right ahead. I will just let you talk. Go on. [fol. 2481] Mr. Coyle: Well, if you look at Government's Exhibit 12, which is not the pretrial order, it is an answer to interrogatories that we submitted. It says the 20 leading chains of supermarkets referred to in paragraph 61 above competed in the following activities. And this is a quote:

“(a) Competition in purchasing supplies and merchandising on better terms than their competitors, and to secure other purchasing advantages; competition to

distribute products cheaper, and to secure advantages in the distribution of products in the retail outlets——”

That is an effect on suppliers, and it is in there in specific terms.

The Court: Well, counsel, I might make this observation: You would have had a very good brief in this case if you had not been so positive. I don't think positive statements are really in good taste in a brief where you just flatly say there isn't any doubt or question about a thing.

It seems to me that this is the problem I have to decide, and I have got a lot of doubts in this case. I haven't made up my mind yet. But all your introductory portions of your brief are just flat statements that there can't be any doubt. [fol. 2482] Mr. Coyle: Your Honor, I can't read the cases and see that there is any doubt.

The Court: Well——

Mr. Coyle: I am sure—I didn't write this brief myself. This brief was prepared by the Department of Justice and——

The Court: I am sure it is. But it is written as if—I want to read you paragraph 5 at line——

Mr. Coyle: Which page is this, your Honor?

The Court: Page 1.

Is it your position that the court cannot consider the matters in this stipulation at this time?

Mr. Coyle: Which stipulation?

The Court: That has just been filed.

Mr. Coyle: Let me get the stipulation, your Honor. Paragraph 1 of the stipulation, are you referring to——

The Court: No, no, counsel. I am referring to page 1 of your statement.

Mr. Coyle: Yes.

The Court: From your brief, which is at line 19. And I will read it:

“5. An attempt to adjudicate horizontal mergers on the basis of alleged changes in the vigor of competition [fol. 2483] occurring subsequent to the filing of suit would be inconsistent with the prospective nature of the Clayton Act and the practical administration of justice * * *”

Mr. Coyle: Yes, your Honor.

The Court: Why did you sign the stipulation?

Mr. Coyle: We reserve our right to object as to the materiality and relevancy of the stipulation. We don't think the facts in that stipulation were relevant, we think they are irrelevant and inconsequential facts.

The Court: In other words, you are taking the position, as a matter of law, that you have to determine as of the date of the filing of the complaint.

Mr. Coyle: Yes, your Honor. And I would like to refer the court to——

The Court: I am not asking you to refer to anything. If you will just answer my questions for a few moments, I will give you ample time to argue, counsel.

Mr. Coyle: Yes, sir.

The Court: But I am asking questions and I want them answered.

Mr. Coyle: Yes, sir. I am sorry, your Honor.

The Court: So if you would only be patient and listen, I would like to ask several questions to clarify things in my mind. Then you can have several hours, if you wish, to argue.

[fol. 2484] Mr. Coyle: Very well, your Honor.

The Court: But give me, please, the courtesy of giving an answer.

Now, the first thing I want to know is: Do you have any authority that holds that you must determine it as of the date of the filing of the complaint?

Mr. Coyle: Yes, your Honor. We cite the Dupont-General Motors case.

The Court: Other than that case do you have any?

Mr. Coyle: The Philadelphia Bank case, the Brown Shoe case, the court wouldn't look at changes in the vigor of competition subsequent to the merger.

The Court: In other words—may I ask you this—if it develops that after the complaint was filed, that the case was not tried within one year, that the vigor of the competition changed to such an extent that there could be no possibility whatsoever of substantially lessening competition, the court would have to disregard that, even though the injunction period would relate from the date the judgment was entered.

Mr. Coyle: The Supreme Court said in the Dupont-General Motors case, as of the time the suit—in every case you have to—now there may be something going to relief, that might be a different question. But the issue before the court is whether this acquisition was illegal as [fol. 2485] of the time it was made. Businessmen in the whole community would be in a horrible position if they could never tell whether a merger was legal or illegal unless they waited three or four or five or six years.

The Court: Well, I want to tell you this, it is no fault of mine that this case is so long getting to trial. Now this case came to me through at least three other judges.

Mr. Coyle: I appreciate that, your Honor.

The Court: And I suppose that it was because the calendars were crowded and we were short on judges and I certainly am not criticizing any of the judges.

But when I come to assume that I should decide the case as of the time of filing there was a possibility of substantially lessening competition, but as of the date I begin to enter a decree, I find out that the whole situation is changed, do I still have to enter a decree?

Mr. Coyle: If the merger was illegal when it was consummated, the court should find it was illegal when it was consummated, yes, your Honor.

The Court: Then I should issue a decree restraining it!

Mr. Coyle: I don't know what the decree should be, your Honor. You would have to look at the facts.

The Court: Suppose I find that as a result of that then [fol. 2486] it was illegal at the time, that it was substantially—but it is changed now and I will not issue a decree. Then what would be the situation?

Mr. Coyle: That is not the situation in this case, your Honor, because there is no probative evidence in this record showing—

The Court: Counsel, these are matters that I have to decide. There you go again with your positive assertions. With all due respect to you, I have to make these decisions myself.

Mr. Coyle: In my judgment there is no probative evidence, your Honor.

The Court: Well, that is a different proposition. Flat statements I don't think accomplish anything, because I

frankly have not made up my mind in this case. And I would like to be persuaded by reasoning and not flat statements.

Well, I take it then your position is, first of all you must decide the case as of the date of the filing of the suit, is that correct?

Mr. Coyle: Yes, your Honor, whether there is a reasonable probability as of the date the suit was filed.

The Court: All right. I would like to hear from the other side on this question of whether or not the issue—what is there in the case on this question of suppliers, other than what is in the pretrial order?

[fol. 2487] Mr. Vaughn: Absolutely nothing, your Honor, not one word of evidence, so far as we know.

In the brief recently filed by the government, they refer to an interrogatory that was answered having to do with suppliers when there was a possible answer before the pretrial order, before suppliers, according to our contention at least, were eliminated from the case entirely. They refer to an interrogatory—

The Court: Was there a discussion before the pretrial conference as to elimination of that?

Mr. Vaughn: There were discussions—we took the position that the relevant section of the country for suppliers, your Honor, was the United States as a whole, relying upon the decision in the Tampa Electric case which says that you have to determine the relevant section of the country by determining where the purchaser had to go to purchase supplies from the seller. In other words, where the seller is located. And that is the United States as a whole.

We took that position consistently in negotiations that lead to the pretrial conference order. The pretrial conference order contained provisions which are really the result of those negotiations. And we did not hear a word about suppliers in this case until the other day when we received this brief suggesting—

[fol. 2488] The Court: Well, that was prompted by my question, because in studying all of this record—and incidentally there is far more of this record than would appear on the surface when one comes to read over all of these documents and exhibits and check all of these things that

are in this case—but in studying the case I more or less came to the conclusion that the issue as to suppliers was pretty much not directly involved in the case, except insofar as it was set up in the pretrial order, in that there were suppliers from out of the state, in that there was newspaper advertising purchased by these two concerns—those things, of course, are in the case.

Mr. Vaughn: I would like to say that the information with regard to shipment of supplies from outside of the State was inserted in the pretrial conference order for one reason, and that is to establish the jurisdiction of this court by showing interstate commerce. It had nothing to do with the effect of the merger on any suppliers.

The Court: That was my impression at the time, that this case had been boiled down to the issue of whether or not there was a probability of substantially lessening competition in the relevant trade area here by reason of this merger.

Mr. Vaughn: That is correct, your Honor. That is my understanding as well.

[fol. 2489] I might also point out that the line of commerce in this case is not newspaper advertising, and it is not railroad shipments. And moreover there is absolutely no proof that the merger has affected newspapers, railroads, or any supplier of any product. Not a word of evidence was ever offered.

The Court: All right. Let me ask you on this other point. Now counsel has made the point here that the court must determine as of the date of the filing of the suit, the application of the claims. What is your position on that?

Mr. Vaughn: Our position is that the court can consider post acquisition evidence, and evidence after the filing of the suit. And we think we can demonstrate that.

The Court: What is your authority?

Mr. Vaughn: United States vs. Dupont.

The Court: That is the case he cites.

Mr. Vaughn: I realize that. That case had to do with a merger that occurred in 1929—1919, I beg your pardon. The action was filed in 1949.

The defendants in that case took the position that the court had to look at things as they were in 1919. The

Supreme Court rejected that argument and said that it could look at things "as of the time of suit."

And it is clear from the court's record and the [fol. 2490] opinion that they considered evidence up to 1955. The suit was filed in 1949—there is a table on page 565 which shows there are percentages and elements up to 1955. And there are other indications in the opinion, which was rendered in 1956, that the court considered all evidence from the time of the acquisition in 1919 until the case was finally decided by the Supreme Court in 1955.

The Court: Well, the problem that strikes me is that, after all, you are acting as a court of equity, and let's assume for the purpose of discussion—and we are about to adjourn in a moment anyway and take up at 2:00 o'clock—but let's assume that plaintiffs came in and made a perfectly good equity case for granting of an injunction. But by the time the court was ready to issue the injunction, the decree, the facts had changed so completely that the court did not consider an injunction appropriate.

Now—

Mr. Vaughn: In that—

The Court: All right, go ahead.

Mr. Vaughn: I didn't mean to interrupt you. I thought perhaps you would want me to respond to that, your Honor.

The Court: No. I will in a moment. But I want to take the other phase of it.

The other phase is that, well, counsel says you [fol. 2491] must look to the filing of the complaint date to determine whether or not at that time there was substantial lessening of competition. I don't think you can pick one day in determining that issue. I think you have to, as the Supreme Court said—I don't agree that it should be, in the case of business, you have to be prospective, you are more or less clairvoyant as to the future. And furthermore I think it is a sad thing that judges who have so little experience in business have to be the clairvoyants. But if you have to be a clairvoyant, then it seems to me you have to look at what is going on in the future. And what is going on at the trial of this case has been in the future, and now it is in the past.

Mr. Vaughn: That's right.

The Court: And it seems to me that if the court were to say, well, all right, as of the date of the filing of the complaint there might be a possibility, substantial possibility of lessening competition, but after considering all that has happened since, there is no longer that possibility. So I grant you a judgment that it was illegal at the time but now I say I will not restrain.

That is what in effect I would like to hear some discussion on this question of the effect, if any, of these effects that have been stipulated to. And I would like also to hear from both sides, as I pointed out heretofore, [fol. 2492] one of the things that bothers me in this case is that, I think the government has disregarded it completely, I think that many men have left the chains to go in business in independent businesses. And in a relevant area where this is possible I wonder what that proves.

And I also have noted that the number of individual stores that have been opened are rather substantial.

Now, we don't have the facts as to how many stores have been closed by the chains, and I take it there must have been a considerable number. One only has to ride the streets of Los Angeles and see them disappear, to know that they have been disappearing. And I take it it is for modernization purposes, getting new locations, and various and sundry things. But that is not before the court that I can find. I have no facts on that.

So I am concerned now also with a comparison, while I am talking—you can take it up after lunch—the comparison between the Philadelphia Bank case. There in that case, as I remember it, there was a—and then I am finished, we will take a recess—after the merger the bank would have 38 per cent—36 per cent of the area's banking assets, 36 per cent of the deposits, 34 per cent of the net loans. And in that case the Philadelphia Bank and the second largest bank, these two combined, would have had [fol. 2493] 59 per cent of the total assets, 58 per cent of the deposits and 58 per cent of the net loans.

Now, the four largest banks would have had 78 per cent of the total assets. And I am wondering if, in our situation here how in the—well, as a general statement of authority, how there is a parallel between the Philadelphia Bank case and the case at bar.

We will adjourn until 2:00 o'clock and I will hear from you gentlemen. And as a matter of fact it may be necessary to continue over to tomorrow. I want to explore several things in the case.

Mr. Alsup: May we leave our materials here, your Honor?

The Court: Well, I have other counsel coming in on other matters. I think you had better sort of gather them up.

Mr. Alsup: Very good.

The Court: We may have a few moments on another matter to interrupt you. But just as a precaution I would say you had better put them in one stack, counsel.

Mr. Alsup: Very good, your Honor.

(Whereupon, at 12:05 p. m., court was in recess until 2:00 o'clock p. m. of the same day.)

[fol. 2494] LOS ANGELES, CALIFORNIA, MONDAY, MARCH 23,
1964, 2:00 P. M.

(Other court matters.)

The Court: All right, gentlemen, let's proceed with the Von's case.

The Clerk: The United States vs. Von's Grocery for further proceedings.

The Court: Now I will hear from the government. And you might start out with the preface, before you say anything, that I think that the pretrial order settles most of the matters in this case—in fact all but one, as far as I can see. And that is whether or not this merger would probably, under the Section 7 of the Clayton Act, would probably—I guess possibly is the word, isn't it?

Mr. Coyle: Or may, Your Honor.

The Court: What is the difference? All right. We will take probably or may—substantially lessen competition.

Now, I think the pretrial order, you have agreed as to the relevant area, as to the line of commerce and all of the things except as to that question. Do you agree or disagree, counsel?

Mr. Coyle: We agree as to the line of commerce and section of the country. We agree as to many other facts which go toward establishing that this merger may [fol. 2495] lessen competition, or tend to do so, your Honor.

The Court: You didn't agree on that.

Mr. Coyle: We did not agree on the ultimate, but we agree to many elements that go toward establishing unlawfulness under the statute.

The Court: What I am trying to do is resolve what issues we have to discuss. As I understand it, we only have one issue, and that is whether or not this merger would probably substantially diminish competition.

Mr. Coyle: I think the pretrial conference order states it in these terms, on page 13 of the pretrial conference order it states: What are the factual and legal tests which the government must meet in proving that the effect of this acquisition, or proposed acquisition may be to substantially lessen the competition in violation of Section 7 of the Clayton Act.

And then on paragraph 15 of the following page it says: What are the actual and legal tests which the government must meet to prove that the effect of this acquisition and/or proposed acquisition may be to tend to create a monopoly—I am not sure that “and/or proposed” goes in there.

The Court: That pretty well merges itself into the one question, does it substantially lessen competition.

Mr. Coyle: No, it is what is the tests the government must meet.

The Court: Well, the test is a question of law, of course.

Mr. Coyle: That is the only issue that is unresolved, what is the test which the government must meet.

The Court: All right. I will hear from you. What is the test?

Mr. Coyle: Well, we state the test on page 1 of our memorandum:

“ * * * As a matter of law, the horizontal merger between two substantial competitive factors violates Section 7 where the line of commerce in the section of the country are affected substantially * * * ”

The Court: You mean where it is affected, suppose it is affected to a point where it creates more competition?

Mr. Coyle: I say where the lines of commerce in the sections of the country affected are substantial—in other words, if you have a merger, a horizontal merger between two large organizations, competitive factors in the same line of commerce, the same section of the country, that violates amended Section 7, if that line of commerce in that section of the country is a substantial, economically significant line of commerce in that section of the country. [fol. 2497] The Court: Is that all?

Mr. Coyle: That is what we say. It is a matter of law, that is item 2 on our list here.

The Court: I read that. I was a little bit shocked to read it, frankly. You are saying in effect, that mergers, a fortiori, are illegal.

Mr. Coyle: No, your Honor, we say horizontal mergers between two substantial, significant competitive factors is illegal if the line of commerce and section of the country affected by the merger is substantial.

The Court: Affected in what way, counsel?

Mr. Coyle: In which the merger occurs. In other words, the area in which this merger occurred was the Los Angeles Metropolitan Area. The line of commerce was groceries and related products. That is an economically significant, economically substantial part of the nation's economy.

The partners to the merger were two of the largest, strongest, most prominent grocery chains operating in that area. They merged. Instead of two operations you have one. That produces the effect which the statute requires to establish illegality.

The Court: That is rather drastic. Do you think the Supreme Court went that far?

Mr. Coyle: I think the Supreme Court—I think [fol. 2498] Congress went that far.

The Court: I don't see it. I don't think they went that far. You are saying there can be no mergers between two strong competitors.

Mr. Coyle: In an economically significant section of the country.

The Court: Well, let's resolve that now. The pretrial order, it seems to me, recognizes the fact that, at least

for the purpose of discussion I will recognize it that the Metropolitan Area is legally a significant economic area.

Mr. Coyle: There is no question of that in my mind, your Honor.

The Court: I am glad you had it in your mind. At least I am getting the benefit of opinion rather than a flat statement.

But that is not the problem. You are saying that just merger alone, per se is illegal.

Mr. Coyle: That is the first point. The first point is that the Los Angeles Metropolitan Area was economically significant and substantial.

The second point is that these two defendants were economically significant and substantial.

And we determine that by analyzing the market structure.

[fol. 2499] The Court: Well, let's assume for the purpose of your argument that they were both economically significant, they were both going concerns doing a substantial business, and were competing in the area.

Mr. Coyle: Yes, but—

The Court: Now, then, the mere merger alone you say is sufficient to violate the Section 7?

Mr. Coyle: To determine how substantial, how significant these firms are, you have to analyze them in terms of the relevant market structure. In other words, you have to take into consideration whether this is a market that was heading towards concentration. It was.

Whether it was a fragmented market that was headed toward concentration. It was a fragmented market heading towards concentration.

Whether there had been prior mergers in the area which had tended to increase the concentration. There were prior mergers in the area.

When you consider the importance of these firms in the context of this market structure, and in the context of this economically significant section of the country, that is the test of illegality under Section 7. And we have met it.

The Court: Well, if it is, we might as well—if that is the test, there can be no more mergers.

Mr. Coyle: Certainly there can be mergers if [fol. 2500] they are not mergers of substantially competi-

tive factors in an economically significant section of the country. And if that section of the country is headed toward concentration. The Supreme Court says——

The Court: Of course "heading" is a word that bothers me considerably.

Mr. Coyle: Well, you have to look at the market prior to the merger. It was heading toward it prior to the merger.

The Court: Well, that is your statement. But whether the evidence supports it——

Mr. Coyle: Well, let's look at the evidence, your Honor.

The Court: All right. Let's hear what you contend prove that. Who is the burden on here, the government? Or is it on the defendant?

Mr. Coyle: The burden is on the government, your Honor. And we have had our burden, there is no doubt about that.

The Court: I see. Well, I am glad you are resolving these things for me.

Mr. Coyle: That is in the pretrial conference order, most of it, your Honor.

The Court: Counsel, it is just sort of hard for me to get used to counsel resolving all the points before I [fol. 2501] even——

Mr. Coyle: Yes, your Honor.

Now, the increase in concentration is this: In the year 1948 the market share represented by the 20 leading grocery chains in the Los Angeles Metropolitan Area was 43.8 per cent.

In 1958 it was 56.9 per cent.

Now, that is a fact of record.

In the year 1948 the market share represented by the 16 leading grocers, grocery chains in the Los Angeles Metropolitan Area, was 41.6 per cent.

In 1958 it was 53.4 per cent. That is an increase of concentration.

In 1948 the market share represented by the 12 leading grocery chains of the Los Angeles Metropolitan Area was 38.8 per cent.

In 1958 it was 38.8 per cent.

In 1948 the market share represented by the 8 leading grocery chains in the Los Angeles Metropolitan Area was 33.7 per cent.

In 1958 it was 40.9 per cent.

As a result of the merger between Von's and Shopping Bag the market share of the four largest concerns in the area, which was 25.9 per cent in 1948, increased to 28.6 per cent on the basis of 1958 figures.

[fol. 2502] Since 1940 there has been a decrease in the number of grocery stores in operation in the Los Angeles area.

The Court: What caused that, counsel?

Mr. Coyle: They went out of business. I don't know, your Honor—

The Court: Well, the proof doesn't show, either.

Mr. Coyle: It certainly shows there were fewer stores in the area.

The Court: Well, suppose they burned down, counsel.

Mr. Coyle: Well, there is absolutely no—that would certainly be an increase in concentration, when that happens at the same time that the leading chains in the area are increasing their market share, it certainly indicates that fewer firms are competing for a larger percentage of the business.

The Court: You are talking practically socialism. You are not talking law.

Mr. Coyle: I am talking—

The Court: I am talking about the legal effect. If you want to equalize everybody, that is one thing. But what I am talking about now is: Why did those stores disappear?

Mr. Coyle: Well, it is impossible to say that, they disappeared for a variety of reasons that are not relevant or material. They went out of business.

The Court: Why wouldn't it be relevant?

Mr. Coyle: More of them went out of business than entered the market. That is all you can say about it. More went out than entered. And that is what the Supreme Court considered in the Brown Shoe and Philadelphia Bank. That is what the Supreme Court said. More went out than came in. The leading chains kept increasing their market shares with the result that—

The Court: How many more stores now does Ralphs have than they had five years ago, do you know?

Mr. Coyle: No, but the chains in the area, I have some figures on the chains.

The Court: How many more does Safeway have now than it had 20 years ago?

Mr. Coyle: Safeway has fewer stores. And it is the only chain that has decreased the number of stores.

The Court: How about Ralphs?

Mr. Coyle: I am not sure in the last 20, but in the last 10 years it has gone up.

The Court: Gone up?

Mr. Coyle: It hasn't gone up too much, it has held its own. There hasn't been too much change.

The Court: I don't believe there was any evidence as to Ralphs, as I remember it.

[fol. 2504] Mr. Coyle: I don't—

The Court: I thought there was some testimony, as I recollect, that one other company had decreased in the number of stores.

Mr. Coyle: I don't think so.

The Court: One of the chains.

Mr. Coyle: There may be there was some testimony that Mayfair has sold off some stores. But they opened more new stores than they sold off, Mayfair and Thriftmart.

The Court: But, counsel, what you are saying to me is that I just take flat figures, and from those figures draw the inference that they are being put out of business.

Mr. Coyle: No, you look at the history of the market, how many firms were there so many years ago, how many have been added to the leading firms of so many years ago, how many do we have, and how big were these two defendants in terms of the relevant market? They were big, in terms of the relevant market.

The Court: Is size alone sufficient?

Mr. Coyle: No, size has to be considered in the framework of the given market structure.

The Court: Well, just for the purpose of discussion let's take the figures that you have set forth of the various stores—what page is that? I think it is in your more recent memorandum.

[fol. 2505] Mr. Coyle: It might be on page 4.

The Court: Yes. Here you have set forth—about what percentage do those stores represent?

Mr. Coyle: That is the 10 leading stores.

The Court: Less than 50 per cent, isn't it?

Mr. Coyle: Oh, yes, about 40 per cent. Let me add it.

Mr. Vaughn: You have got Von's and Shopping Bag twice. You have got them added in here twice.

Mr. Coyle: Yes, I have them twice.

The Court: Yes, they are added twice, counsel. You have them first, total of Von's and Shopping Bag, 8.9, and then you have down below—

Mr. Coyle: We haven't added them, your Honor.

The Court: I see. Don't add them twice.

Mr. Coyle: I won't add them twice.

The Court: Is that 43.6?

Mr. Coyle: 42 I have got.

Mr. Vaughn: I get 43.5.

The Court: 43.6. I think that is correct.

Mr. Coyle: Yes, your Honor.

The Court: So the markets that you are talking about have 43—practically 44 per cent of the relevant market.

Mr. Coyle: That is correct, your Honor.

[fol. 2506] The Court: Whereas you have another 53 per cent represented by the mostly independent stores.

Mr. Coyle: I wouldn't say that, your Honor. If you look at all the other figures that are a little further on—

The Court: Well what do you call independent, counsel? Just one store?

Mr. Coyle: I would call it just one store, but if you look at the figures on page 20 you will see that in the year 1948 the 20 largest chains in the area had 43.8 per cent and the smaller chains and independents had 56.2 per cent.

The Court: What page is that?

The Court: Page 20.

The Court: You see, the thing that is bothering me, counsel, is, in the Brown Shoe case you had a double-barreled question involved there. You had both the vertical and horizontal problem there where a large shoe company was buying out the retail establishments, and was in a position to eliminate competition from suppliers. And it was a big manufacturer, one of the largest, which was in the position to absorb and take over the retail sales. So you had both the horizontal and the vertical situation that you don't have in this case.

Mr. Coyle: But, your Honor—

[fol. 2507] The Court: Go ahead.

Mr. Coyle: But the Supreme Court said, both on the

horizontal phase of the case and the vertical phase of the case, the burden of proof was on the government to prove. The horizontal phase of the case was really independent of the vertical phase of the case.

The Court: Well, I don't know that I understand it that way. But let's take it one step further.

Now in the Philadelphia Bank case, here was a situation where the two merging banks ended up with about—I think I read those figures this morning—they ended up with 59 per cent of the assets, 58 per cent of the deposits, and 58 per cent of the net loans.

Whereas in our instant case before the court, you end up with less than 9 per cent.

Mr. Coyle: There is no question but the percentages are different in this case than in the Philadelphia Bank case, and the Brown Shoe case, to get back to that case—the percentages of the four largest firms was smaller than the percentages to the four largest firms here, whether you take the manufacturing percentages or the retail percentages. When you get down to the largest vertical percent, the percentages were much larger in the Brown Shoe case, both vertically and horizontally than here. So there is really no standard percentage figures that the court [fol. 2508] can put its finger on.

The Court: Of course I am not sure that I understand some of the classic language in this opinion of the Supreme Court. It may be it is beyond my level, because some of the language is rather difficult for me to understand. I thought perhaps I did not have the intuitive understanding of these things to comprehend what is being said.

But I thought that it took more than just a—well, let's assume for the purpose of applying the Brown Shoe case that each one of these companies had 1 per cent of the business in the area. Would that be sufficient, under your contention, to bring it within the purview of Section 7?

Mr. Coyle: You are referring to this—

The Court: This case before us.

Mr. Coyle: This particular market structure.

The Court: Yes.

Mr. Coyle: Certainly 1 per cent of this market structure is not nearly as substantial as 4 per cent, 4½ per cent.

The Court: Well, I am trying to mark off—

Mr. Coyle: I don't know where the Supreme Court is going to draw the line. But I am convinced myself that the Supreme Court, when it does draw the line as to what it takes to make a firm substantial, what it takes to make a [fol. 2509] market area substantial, is going to draw the line at a position where this market area, the Los Angeles Metropolitan Area, and firms of this size and this significance in this particular structure with this trend toward increased concentration, the Supreme Court is going to draw the line and hold that these firms are above the minimum and this market area is above the minimum and the concentration pattern in this market area is above the minimum and this merger is illegal.

The Court: Well, it will come to a point then to where the courts are going to be the ones to decide how much business is what in the grocery business, I guess. Is that what it is going to be?

Mr. Coyle: Well, your Honor—

The Court: I thought there had to be some rule which a judge had to follow—

Mr. Coyle: This is a rule, this is a rule that substantial competitive factors in an economically significant market area, that is the clearest rule I think that the court can draw.

The only other alternative is to go back to the Sherman Act—

The Court: No, we are not going back to the Sherman Act. What I am trying to find out is: What are you using to determine what is substantially lessening competition? [fol. 2510] I can't get it from the Supreme Court decision and I haven't gotten it from you. Where is the substantial lessening of competition. Put your finger on it. Let's put our hands right on that and not talk in these generalities that you get in most of these statements.

I have read the Brown Shoe case a dozen times and I doubt if I understand it any more if I read it a dozen more times.

And as a matter of fact I read a couple of Law Journal articles by very erudite students and practitioners who are having the same difficulty that I am having.

One of them calls this opinion a schizoid opinion, you remember? In the Law Journal article written before the American Bar Association.

Mr. Coyle: Yes, he is one of the big practitioners on the other side, your Honor.

The Court: Well, I don't know——

Mr. Coyle: They don't like this Brown Shoe. I think it is a wonderful opinion but defense counsel don't like it. It is one of the landmark opinions——

The Court: Well, I am not concerned with the like or dislike. What I am trying to do is find out what the law is. I haven't found out yet.

I don't think the Supreme Court would like it being called a schizoid opinion, but I am merely quoting what I [fol. 2511] read in this—I believe it was in the Federal Bar Journal.

Did you read that article, counsel?

Mr. Coyle: I read one in the Federal Bar Journal. I think that schizoid language came from another article.

The Court: That came from an appearance before a committee of the American Bar.

Mr. Coyle: Yes, that's right. I think that was Milton Hand, or somebody like that.

The Court: Well, put your hand, touch for me, show me what the—I am not saying it doesn't exist—but what is the substantial lessening of competition? Now the elimination of the competition between the two is not the test in this case. That you agree, don't you?

Mr. Coyle: Certainly the elimination of competition between the two was the test prior to the amendment. The amendment says that if it may substantially lessen competition—that doesn't mean you don't look at the fact that you do have the competitive factors in the area prior to the merger and the competition between them and the competition between them and everybody else in the area has been lessened. You look at that. Sure you look at that.

The Court: Well, the Congress in the report before Congress specifically point out that they thought the problem was that if they left that Section 7, that there could be no merger. So they were eliminating that test, is [fol. 2512] that correct?

Mr. Coyle: They wanted to make sure that the Act wasn't applied to small firms——

The Court: Did they say small firms?

Mr. Coyle: Small firms in little towns, yes, sir, your Honor.

The Court: I didn't find that in the hearing proceedings. Maybe I missed it. Let me see if I don't have it here.

Mr. Coyle: I have it here, your Honor.

The Court: I thought it said between acquiring and acquired companies. I didn't remember that language about small.

Mr. Coyle: It says in the Senate Report, page 4, your Honor.

The Court: That is Senate Report 1775, is that the one?

Mr. Coyle: 1777, yes—no, I am sorry. You are right, 1775.

The Court: All right. Read it, would you please, counsel.

Mr. Coyle: Well, starting with paragraph 2, I guess:

"While on the one hand it was desired that the test be [fol. 2513] more inclusive and stricter than that of the Sherman Act, and on the other hand it was not desired that the bill go to the extreme prohibiting all acquisition between competing companies."

However, in the course of the hearings on this bill in the House Judiciary Committee, the wording was objected to on the grounds that it might be so construed as to prevent all acquisitions between competitors. Accordingly, subsequent versions of the bill, including the present HR 2734, deleted any reference to the effect on competition between the acquired and acquiring firms.

The use of this word—the word "community," that is down in the second paragraph to the last:

"The use of this word raised a strong controversy centering around the possibility that the Act so worded might go so far as to prevent any local enterprise in a small town from buying up another local enterprise in the same town. As a consequence the word 'community' was dropped in the subsequent version of the bill. • • •"

The Court: Well, I don't quite think that it says just what you say it says.

Mr. Coyle: Well—

The Court: In other words, it is saying, as it finally [fol. 2514] passed, the committee is saying, "Well, what

we are doing here is to drop the Section 7 test, which was a test as between acquiring and acquired firms."

Mr. Coyle: I think we should also read into it the fact that between the acquiring and acquired firms, and also the word "community." These two things were considered at the same time. They dropped the word "community" from the statute at the same time.

The Court: Well, so in an area such as we are talking about, in a relevant area such as the Metropolitan Area here, the test does not relate between the acquired and the acquiring. It relates to the substantial effect on competition generally.

Mr. Coyle: Yes, your Honor. But then it results from the fact that there was a concern that the Act might have applied to a merger between the two local firms in small communities, to make sure that—

The Court: Well, where does it say "small community and local firms"?

Mr. Coyle: That is just what I am saying.

The Court: That isn't what the report says. That is what the complaint was about. May I see that just a moment?

Mr. Coyle: Yes. Maybe I don't understand your question, your Honor.

[fol. 2515] The Court: Maybe I am not putting it clearly. Let me see if I can clarify it.

Mr. Coyle: The paragraph there, your Honor.

(The document was handed to the court.)

Mr. Coyle: I am referring to the second paragraph there, your Honor.

The Court: Let's start over again. Maybe we can work this out and then we will take a recess for a few moments.

"These bills simply extended the present wording of the Clayton Act to cover acquisition of assets. The test of competition between the acquiring and the acquired firms was left in the bill and made applicable to assets as well as to stock. However, in the course of hearings on this bill in the House Judiciary Committee this wording was objected to on the grounds that it might be construed as to prevent all acquisitions between competitors."

Now, that was the objection, "all acquisitions," the word "all" meaning any kind of acquisition.

Mr. Coyle: That is correct, your Honor.

The Court: "Accordingly, subsequent versions of the bill, including the present H.R. 2734, deleted any [fol. 2516] reference to the effect on competition between the acquiring and acquired firms * * *"

So it deleted it.

Now, then, you point another step which had the same general effect, but which was also to be found in the legislative history of the present bill—what am I reading here? This is still from the Senate Report—" * * * as the bill originally stood, it was to be violated if, among other things, competition was substantially lessened * * * in any community * * *"

Well, "community" can be a metropolitan area, can't it?

Mr. Coyle: I don't think it can in the terms of that bill, your Honor.

The Court: Why doesn't it say "of the country" then?

Mr. Coyle: To make it more specific.

The Court: Then it says:

" * * * The use of this word raised a storm of controversy centering around the possibility that the Act so worded might go so far as to prevent any local enterprise in a small town from buying up a local enterprise in the same town. As a consequence the word 'community' was dropped from the subsequent versions of the bill. * * *"

So when they dropped the word "community," what [fol. 2517] did they do?

Mr. Coyle: Sir, they wanted to make it clear that the amended Act did not apply to every merger between two competitors in a small town or community.

The Court: Well, you are leveling it to the small towns.

Mr. Coyle: Yes, your Honor. Or small competitors in a small town.

The Court: What is a small town? Now, here we are in the realm of what is a small town. A businessman has got to figure out before he merges whether he is in a small or a big town. This is pretty difficult for practical

people. It may not be for you but for practical businessmen, how are they going to decide what is big and what is a small town?

Mr. Coyle: I know the Los Angeles Metropolitan Area is big. I don't know where the Supreme Court is going to draw the line as it comes down the scale, but I am certain it is going to draw it below the Los Angeles Metropolitan area.

The Court: Well, the way I read the bill is that they have taken out the objections, taken out the Section 7 test that originally existed, that was the competition between the acquired and acquiring.

Mr. Coyle: Yes, sir.

[fol. 2518] The Court: And I think, as a matter of law, you can consider that, in connection with the general situation in the test.

Mr. Coyle: That is exactly what I feel, too, your Honor. I didn't mean to say that it was the test. Obviously it is not the test now. But it is one of the considerations.

The Court: Well, let's take about a 15-minute recess. And I want you to put your finger on for me—you know, we people who are practical sometimes have great difficulty in understanding the high thinking. And I want you to put your hand, put to me wherein competition has been substantially lessened.

I want to think whether or not it might be argued that it has been increased. I would like to hear from you why can't it be said that the competition in the area has been materially increased during the very period we are talking about, that the competitive factors are greater today than they were 15 years ago, were greater than at the time maybe when the trial took place.

I would like to hear from you, go into those matters and clear them up for me. I need some help.

Mr. Coyle: Your Honor, before we adjourn, there are two things I think during recess that we would like to discuss.

[fol. 2519] The Court: Yes, certainly.

Mr. Coyle: The first thing is that I probably misspoke when I said that the only case dealing with this post-complaint, or post-trial evidence was the Dupont-General Motors case, because very recently, on March 2nd of 1964, in the Lexington Bank case, the Supreme Court dismissed

a motion without opinion—dismissed a motion to remand for the purpose of bringing the record up to date to show changes in competitive conditions. This is reported in 32 Law Week, 3304.

The Court: 32 Law Week—

Mr. Coyle: 3304.

The Court: 3304.

Mr. Coyle: This was a Sherman Act case, but it does go into this same question of remanded—

The Court: This is not a remand here.

Mr. Coyle: No.

The Court: I haven't decided the case yet.

Mr. Coyle: That's right. The Supreme Court hasn't decided the case, either.

Mr. Alsop: Well, Mr. Coyle, I think you ought to point out in the Lexington Bank case the Supreme Court did not give a reason for refusing to grant—

Mr. Coyle: I said it was without reason. I just wanted to mention that.

[fol. 2520] The second point I want to mention is that at paragraph 5 of the pretrial stipulation on page 3 it reads as follows:

"In a stipulation agreed to by the parties and approved by the court on February 3, 1961, it was provided that trial shall be confined to the issues of whether the merger violates Section 7 of the Clayton Act as amended. In the event the court determines that Section 7 has been violated, hearings will thereafter be held as to appropriate relief."

The Court: Well, that is the same issue right now. If I decide it does, then we will have hearings as to the relief.

Mr. Coyle: That is correct, your Honor. But I think it relates to this business of post-trial evidence.

The Court: The problem here is that people who have no experience, judges who have no experience in this field at all just seem to be writing inclusive opinions on matters that are not so easily ascertained. It gives me great pause. What the Supreme Court does is none of my affair. All I do here is do the best of my ability and then they can do as they think. But while I am here I am going to do what,

in my best judgment, what I think the law is, not what it should be.

[fol. 2521] Mr. Coyle: That's right. And all I can do is present cases which I think—

The Court: Of course, of course.

So we will take a recess until 3:30.

Here I return to your your Senate Report.

(A short recess.)

The Court: All right, counsel. Proceed.

Mr. Coyle: If your Honor please, before I begin, defense counsel has brought one thing up that when I referred to this Lexington Bank case—I don't believe I did, but I didn't want to infer that that was for the purpose of bringing the record up to date to show post-complaint evidence, but it was for the purpose of showing post-trial evidence, but it was a remand to show post-trial evidence and the Supreme Court denied it without right of motion. Mr. Alsop was just mentioning that before recess.

The Court: Are you objecting to the use of the stipulation that you filed?

Mr. Coyle: Insofar as it shows post-complaint and post-trial evidence, I think it is clearly irrelevant, yes, your Honor.

The Court: Well, I will solve that right now. I will put you back on trial basis promptly, right now. We won't get into any of these technicalities, counsel. I have been around here too long for that.

[fol. 2522] I have vacated submission and you will now consider yourself in a continuation of trial.

Mr. Coyle: We closed our case, your Honor.

The Court: Well, I am taking the liberty of re-opening the case for both sides at this time. If you are going to contend now—I don't know why you ever filed this stipulation.

Mr. Coyle: Your Honor, we filed our brief before we filed the stipulation. And we said clearly that the merger was to be judged as of the date of the complaint.

The Court: Are you taking the position now that the court should not consider the stipulation, is that right?

Mr. Coyle: We take the position the court should not consider post-complaint evidence. If there is any post-

complaint evidence in the stipulation, we think it is irrelevant, yes, your Honor. The merger is to be judged as of the date of the complaint.

The Court: Well, how far back can I go from the date of the complaint?

Mr. Coyle: How far back can you go?

The Court: Yes.

Mr. Coyle: I don't know that there is any hard and fast rule on how far back you go.

The Court: Well, are we just to consider the evidence of what was occurring on that date, the date of [fol. 2523] the filing of the complaint?

Mr. Coyle: Yes, your Honor. That is what we—

The Court: This is sort of an afterthought, isn't it, counsel?

Mr. Coyle: No, your Honor, I don't think it is.

Mr. Alsup: May I respond, your Honor?

The Court: Yes, certainly. I would like to hear from you.

Mr. Coyle: We take the position that the very first brief we filed on this business of trying to object to the vigor of competition as of a given date—we took that in our brief before trial.

Mr. Alsup: Your Honor, all of our affidavits dealt with post-complaint matters.

The Court: That is what I thought.

Mr. Alsup: They went in without objection. If your Honor will permit me, I would like to hand you the opinion of Brown Shoe where the Supreme Court made it clear in Brown Shoe that post-complaint evidence is clearly irrelevant. And the Supreme Court considered—

The Court: What is the page? I have the decision here.

Mr. Alsup: I have the Law Edition, your Honor.

The Court: Well, let's see, I have a Law Edition, too, but I didn't bring it this time.

[fol. 2524] Mr. Coyle: I think you are referring to the section entitled Kinney—is that the one?

Mr. Alsup: That is the one that has got the discussion of jurisdiction, at the end of Section 1.

The Court: Well, let's see. What is the Law Edition citation? I will send and get my Law Edition.

Mr. Coyle: I have a copy.

Mr. Alsup: Page 523—I can hand this up to your Honor.

The Court: All right. Pass it up to me, please.

Mr. Alsup: The portions interlined.

(The document was handed to the court.)

Mr. Vaughn: It is page 303 and 304 of U.S.

The Court: Starting with—where do I start counsel?

Mr. Coyle: At the bottom of page 303, your Honor.

Mr. Alsup: Well, where I have underlined it in red, your Honor, the Supreme Court pointed out that the time of the merger Brown Shoe had not been a supplier of Kinney. At the time of the trial it had become a supplier of Kinney. Obviously post-trial data was received, post-complaint data.

Mr. Coyle: Your Honor, there is no question—I tried that Brown Shoe case—there is no question that [fol. 2525] post-trial evidence was submitted in trial. And this is the summary of the District Court's opinion made by the Supreme Court.

But the Supreme Court did not rely on this post-complaint evidence. When the Supreme Court got over to these subsequent pages where it set out the basis for granting the violation, it did rely on this post-complaint evidence.

The Court: It didn't consider it?

Mr. Coyle: It did not state it in its opinion as the evidence it considered.

The Court: What was the date of the—what was the date of the suit in this Brown case?

Mr. Coyle: 1955, filed in 1955, tried in 1958.

The Court: This says:

“ . . . At the time of the merger Kinney bought no shoes from Brown. However, in line with Brown's conceded reasons for acquiring Kinney, Brown had been, by 1957, become the largest outside supplier of Kinney shoes, supplying 7.9 of all Kinney's needs. . . . ”

Mr. Coyle: Yes, that is true. That is in the portion of the opinion where the Supreme Court summarizes the District Court's opinion.

But you go over and then the Supreme Court dis-[fol. 2526] cusses jurisdiction and it discusses legislative

history. Then it gets way over to the point 4, on page 323, and it discusses the vertical aspects of the merger. Then it gets over to page, over two pages, and there it discusses, that is where it gives the reasons for vertical aspects and then it gives the reasons for finding the vertical effects of the merger violated Section 7.

Then it gets over to point 5, on page 334, and it discusses the horizontal reasons for the violation of the Act by the merger.

But this paragraph that counsel refers to is only the Supreme Court's summary of the District Court's opinion.

The Court: You say the Supreme Court didn't consider this matter at all?

Mr. Coyle: I say the Supreme Court didn't list this matter as one of the bases for its decision.

The Court: Well, I thought the Supreme Court discussed at some length just what happened after the acquisition.

Mr. Coyle: I don't think so, your Honor. I think this is the only reference in the whole opinion to post-complaint evidence, or post-complaint activity. And the rest of the case where the Supreme Court sets up its rationale of test, it does not discuss this post complaint aspect.

[fol. 2527] The Court: Well, I can't understand, to save my soul, how a court can close its eyes to everything after the day the trial begins. The Supreme Court has expressed itself, saying that this is a prospective thing, if you look in the future it is probable that competition will be substantially lessened.

And the Supreme Court keeps saying it is a prediction, pretty much. Now, if you are going to predict something and, you have got facts in front of you, can't you use those facts in connection with the prediction?

Mr. Coyle: No. The finding that the court has to make is whether or not there was a probability of lessening of competition when the merger took place.

Now, if the court gets into the position where it is going to say, four years have gone by and we don't see any lessening of competition, that is an artificial test because 10 years from the time the acquisition took place you might infer it would occur.

For instance, in the Dupont-General Motors case the

acquisition occurred 40 years prior to the time. The action was still prospective when the suit was filed. And the Supreme Court said it was still prospective. It looks now as if there may be a lessening of competition——

The Court: Looks now?

[fol. 2528] Mr. Coyle: As of the time the suit was filed, yes, even though the acquisition took place 40 years in advance.

The Court: Didn't they look at the time of the decision?

Mr. Coyle: No, at the time——

The Court: They didn't consider that at all?

Mr. Coyle: I don't know. No, your Honor. The language is clear—at the time of the suit there is a reasonable probability that the acquisition is likely to result in restraint. And then they say where it appears——

The Court: Well, this suit is in progress right now.

Mr. Coyle: At the time of suit means at the time the complaint was filed, your Honor.

Mr. Vaughn: That is their contention.

The Court: That is your contention.

Mr. Coyle: Your Honor, otherwise we would be on quicksand. We would have closed our discovery in 1961, we were ready to go to trial in August of 1961 some time. We can judge it as of that time, we can judge it as of the date the complaint was filed. Are we going to reopen the record, bring in something else to bring it up to date——

The Court: We might very well do that, counsel. That is what we are doing to some extent.

Mr. Coyle: Are we going to do it continually, [fol. 2529] is that——

The Court: We will decide that when the time comes.

Mr. Coyle: It certainly is——

The Court: It can't be any more ethereal than some of the things that you are advancing, counsel. In fact, not near so ethereal as some of them.

You are telling me now that as of the date of the filing of the case I have got to decide as of that very day. I can't look prospectively at all.

Yet the Supreme Court says that they are looking to the future to determine what the likelihood will be.

Mr. Coyle: From the specific transaction. The likelihood is that a merger between two substantial factors in a sig-

nificant section of the country, when it tends toward concentration, will decrease competition. But that is the likelihood. That is all the court is called upon to determine. And that is the finding that this case should turn on, your Honor.

The Court: I see. Well, it may be too schoolmasterish for me, I don't know. Maybe it is too much for me, I don't comprehend, counsel.

Mr. Coyle: The Supreme Court opinions in the Brown Shoe and the Philadelphia cases, your Honor, make it so obvious——

[fol. 2530] The Court: Well, I am sure it must be. It is just unfortunate that I don't have the ability to see it so clearly, counsel.

I will hear from the other side.

Your assistants are pointing out to me the specific lessening of competition has not been what I had hoped for.

Mr. Coyle: I have a few things that I can point out to you, if you want, your Honor.

The Court: Yes. I came in this morning with my mind wholly undecided. I am afraid, if anything, you are convincing me the other way.

Mr. Coyle: The pretrial conference order established that this is a horizontal merger, that the defendants are competitive factors in the same line of commerce in the same section of the country. Undisputed facts establish that retail distribution of groceries and related products in the Los Angeles Metropolitan Area has resulted in lessening of a substantial market.

The market structure analysis presented by the government establishes that this merger took place in a fragmented industry with a pronounced trend toward increased concentration. And the history of prior acquisitions and consolidations and mergers plays a significant role in this increased concentration——

[fol. 2531] The Court: That is just the language of the Supreme Court you are reading, isn't it?

Mr. Coyle: No, this is what happened in this——

The Court: Well that is what I am supposed to determine.

Mr. Coyle: This merger united under one control and management two of the largest and most important sep-

arate entities in the market, and it ended the independent existence of an expanding chain of 38 supermarkets with annual sales in excess of \$84,000,000.00. It increased concentration and resulted in a single corporation controlling 8.9 per cent of all retail grocery distribution in the economically significant Los Angeles Metropolitan Area.

This establishes a violation of the Act, sir.

The Court: Well, I will have to decide whether it does or does not.

Mr. Coyle: We think it does, under the Brown Shoe and Philadelphia Bank cases.

The Court: I am sure that you think so. But again I say that flat statements are not the best approach.

Mr. Vaughn: Your Honor, I would like to again point out that in the Dupont case the complaint was filed in 1949. There is reflected in the Supreme Court record evidence relating to the year 1955.

There is no question that in the Dupont case, [fol. 2532] over the defendants' objections—the court did consider evidence after the filing of the case.

That evidence in this case leaves no question that there has not been a lessening in competition in the four years since the merger.

The Court: Before you get to that, counsel, I am disposed to go along, but I can't believe that I am to shut off all evidence.

The case is still pending before me. I have not made a decision. I took this case under advisement and I have studied the record. I have studied it enough to decide that there were many things that the record did not reveal to me that I felt were important in determining what was going on in this area, effective as of the date of filing and thereafter and prior.

So I called you gentlemen together to ask you if you could supply the court, by some form of stipulation, these facts. And I therefore—you remember—vacated the order of submission. When you vacate an order of submission, the case is still pending before this court.

Mr. Vaughn: Yes, your Honor.

The Court: For such further proceedings as I think are appropriate to try to reach justice. And that is the status we are in today.

Now, I hadn't considered that I was precluded [fol. 2533] from viewing these factors. If so, then I couldn't view anything as of the day after—what was the exact date of the filing of this complaint, Mr. Clerk?

Mr. Alsup: March 25, 1960, your Honor.

The Court: March 25, 1960.

Mr. Alsup: We are two days from our anniversary.

The Court: Well, I take it that if I am to carry the thinking of the government to the extreme, or reduce it to its lowest common denominator, or its absurdity, I can't look at anything after March 25, 1960, just put blinkers on.

Mr. Vaughn: I was going to say the government's blindfold approach would have you speculate and blindfold yourself to the actual facts which have occurred in the last four years, which I am sure would be of assistance to anyone in determining whether or not this merger is likely—

The Court: This is an equity action, is it not?

Mr. Vaughn: It is.

The Court: And it is asking for an injunction. And I thought a court of equity had a broad discretion in determining whether or not it should use its arm of equity in restraining, or doing whatever is necessary to carry out the law to obtain justice in the case.

Now, the government seems to have come in with the proposition that I must not look to anything after March 25, 1960.

[fol. 2534] Mr. Vaughn: Your Honor—

The Court: Yet I am supposed to determine whether or not it was substantially lessened in the future.

Mr. Vaughn: Yes, sir, your Honor.

Mr. Coyle: If your Honor please, I think the parties agree that this is a court of equity, but the parties have stipulated and agreed that the only issue to be tried right now was whether this merger violated the law.

Mr. Vaughn: I agree to that.

Mr. Coyle: That is paragraph 5, page 3.

The Court: Well, what other proposition is before the court then? You are asking for an injunction, aren't you?

Mr. Coyle: Yes, your Honor. We will consider relief after the—after we establish illegality.

The Court: You mean to say I have got to close off consideration that I am sitting as a court of equity?

Mr. Coyle: We have stipulated that the first issue to be litigated is whether this is an illegal merger as of the date it took place. That is what the stipulation is, your Honor.

The Court: I see. In other words, you preclude me from giving any equity consideration to the case at this time.

Mr. Coyle: The stipulation says that the trial [fol. 2535] shall be confined to the issue of whether the merger violated Section 7 of the Clayton Act as amended. In the event the court determines that Section 7 has been violated, hearings will thereafter be held as to the appropriate relief.

The Court: Well, you may stipulate to that and I may decide in a different fashion, counsel. I may take a different approach.

Mr. Coyle: I am just pointing out that is what our pretrial order says.

The Court: Well, I considered this—I thought I was sitting as a court in equity, since you are asking for an injunction, that is what it amounts to.

Mr. Coyle: It is a special type of court of equity—

The Court: All right, whatever it is.

Mr. Vaughn: Your Honor.

The Court: Whatever it is. I am asking now—I am apparently, according to the government's view, compelled to view this case only as it existed on March 25, 1960. Nothing thereafter.

So we put in all this evidence—I would like to know, counsel, can you tell me, of all the affidavits that were filed, how much in general related to after 1960?

Mr. Vaughn: The affidavits we prepared tried to go into the whole picture from before the merger right up [fol. 2536] to the present time. We had affidavits of people who had acquired stores in October of 1962, we have affidavits of people right up to the present date.

The Court: Right up to the trial date.

Mr. Vaughn: And there was never an objection. Indeed, your Honor, I know of no Section 7 case in which the government has taken this position before.

The Court: Well, was there any objection at any time to the use of this testimony, bringing it up to the actual beginning of the trial?

Mr. Vaughn: None whatsoever in this case, or in any any other case that I know of, until the other day when this brief was filed.

The Court: I would like to hear. When did you first object, counsel?

Mr. Coyle: Your Honor, we made this point in our pretrial brief prior to the beginning of trial. We objected to the procedure of trying to evaluate changes in the vigor of competition between the time of the filing of the complaint and the date of trial. We objected—

Mr. Vaughn: Your Honor, the government—

Mr. Coyle: We didn't jump and say we object on—

The Court: Well, I should have thought that you would have called it to my attention.

[fol. 2537] Mr. Coyle: We called it to your attention in the brief, your Honor.

ARGUMENT ON BEHALF OF THE DEFENDANTS

Mr. Vaughn: Your Honor, the government itself offered into evidence, and it was received, statistics showing the number of stores in the Los Angeles Metropolitan Area in 1961, in 1962, and in 1963—all after the merger.

The Court: Well, I don't remember hearing a single objection during the trial as to any of these affidavits.

Mr. Vaughn: There was none.

Mr. Coyle: Your Honor, whether there were objections or not, it is a matter of whether this is relevant and material and that is up—

The Court: Counsel, didn't you put in affidavits as to matters after March 25, 1960?

Mr. Coyle: We didn't put in very many affidavits. We put in some statements of industry witnesses. I don't think that they testified to anything that happened after 1960, 1961—1960.

We did bring up the Board of Equalization figures, yes, your Honor. That was the only thing we did.

Mr. Vaughn: They made reference in these affidavits

to mergers which occurred after the Von's Shopping Bag merger. They indicated——

The Court: I distinctly recollect there was a [fol. 2538] mass of testimony—or rather a mass of evidence relating to transactions that occurred after the filing date of March 25, 1960. The record is replete, from both sides of the case.

Mr. Vaughn: Yes, your Honor. And the government, as far as these opinions show, did not raise any objection to the post-acquisition in the Panola case, in the Continental Can case, in the Alcoa case—which was filed three years after the acquisition, or in the Lever Bros. case tried by Mr. Coyle six years after the acquisition.

Mr. Coyle: If your Honor please, I posed my objection every time they mentioned post-filing——

The Court: Counsel, let him finish. He didn't interrupt you at any time. Let him finish.

Mr. Coyle: I am sorry, your Honor.

The Court: I will give you every opportunity to be heard again.

Mr. Vaughn: And it seems to me perfectly obvious that the government is taking this unique position because it knows that the actual facts with regard to the effect of his merger in the last four years are dead against them, that the evidence without contradiction shows that there has been an increase in competition, if anything.

And it likewise shows——

The Court: I would like to have you point out to me, counsel, where the increase has occurred. I have [fol. 2539] been trying to get the both of you now, and I want to get down to specifics. We have been talking in terms of generalities and general principles.

Now tell me, specify if you can, wherein the competition has increased.

Mr. Vaughn: I will address myself to that, your Honor.

First of all, in 1960 there were no discount houses in the Los Angeles Metropolitan Area selling groceries. As of the trial there were 37.

I don't know if we still have a stipulation as to why they have opened up since that time or not——

The Court: I think there was some argument about that. But at any rate you have a stipulation that the

discount houses are now in existence and have opened since that date.

Mr. Vaughn: Yes, your Honor. And these are discount houses, by the way, which the government's own witness, Dr. Ward J. Jenssen said were going to run the conventional supermarket out of business, they were all going to be eliminated by 1970.

The Court: That may well be.

Mr. Vaughn: Yes, your Honor. But it certainly is a new and important form of competition, which has increased competition.

[fol. 2540] Since 1960, three of the largest national concerns in the country, theretofore not doing any business in Los Angeles, have entered this market. They are the Kroeger Company, Acme and Food Fair.

Since 1960 we have seen the failure of three local chains and the dispersment of many of their stores to independents and smaller concerns.

In the year 1960 alone the government's evidence showed there were 127 newcomers to the grocery business in Los Angeles.

Many concerns have increased their number of stores, some of them small concerns. The Michael Markets, headed by a man named Joe Goodnight, from whom we have an affidavit, opened its first store after 1960. And as of the time of the trial it had seven stores in Orange County.

There has been growth in a number of other concerns, as all of our affidavits show.

And we also have the testimony of every single witness who was asked the question, every single one, whether he was a plaintiff's witness or defense witness, that competition has increased since 1960.

The Court: Well, of course, I take that statement the same as I take the government's witnesses' statements. That is nothing more than a conclusion, generally speaking. It is a pure speculative answer, and it is not [fol. 2541] any different from any expert opinion. And the court can either regard it or disregard it.

Mr. Vaughn: Yes, your Honor.

The Court: As the trier of the facts. Because for a groceryman to say just, period, "There is no competition any more," or "There is competition," is a rather broad

statement. If they will specify it, then their testimony might have a little more substantiality.

Mr. Vaughn: Of course these men, your Honor, were witnesses called by the government, for the most part, who were asked whether competition had increased. These were people who deal with it every day. And everyone of them said, "Yes, competition has increased, it is rougher and tougher every day." Competition has increased, they said.

The Court: Well, maybe that is not the kind of competition—it may well be that I may be discerning a theme or a trend throughout all this thinking that has come down from the Supreme Court that there is a type of competition that was meant to keep surviving. It was not a competition that might cause a bad businessman to go out of business, for example.

I can't believe that the Congress intended to protect a businessman who was a poor businessman, who went broke because he was lazy, didn't open up his store, or he [fol. 2542] didn't keep his lights on, or his shelves clean.

There are so many practical things to consider in these things. And the problem I am up against here is wherein does the evidence show the probability of a substantial lessening of competition, when all these affidavits, both government and defense affidavits, show that new stores are opening all the time, and they are not necessarily chain stores.

Mr. Vaughn: Quite right, your Honor. I don't think there is a word of evidence in the record to reflect that in these four years there has been any, actually been any lessening of competition, not a word.

On the contrary, we have seen the success stories of small concerns——

The Court: I am familiar, you don't have to review that, counsel, with these men. I remember the testimony. One of the witnesses who testified, I believe he was a chain store operator and they were having trouble keeping good managers because they were going out and opening stores on their own. Am I correct on that?

Mr. Vaughn: Yes, your Honor. I would like to point out that the following defendant's witnesses all had chain stores and went out and opened their own stores:

Reynold Elkin, former Von's employee.
[fol. 2543] Joe Goodnight, former Alpha Beta for many years, whom I have referred to previously; Ted Wood, formerly with Alpha Beta who went out and formed the Pantry markets.

Al Goldstein, formerly with Food Giant, who went out and opened up a store, took over an old Food Giant Store right across from a brand new Von's Store and is doing very well, better than Food Giant did before the Von's Store.

Joe Hughes, former Thriftimart employee, now operates Hughes Markets.

Jose Goldberg of King Cole Markets who took over one of them and is now competing with Food Giant and Safeway, within 100 yards of his store, and he is competing with them.

John Irwin, formerly at Mayfair, the president of the local trade association, who has opened up a store in Long Beach.

Of the plaintiff's witnesses, one of them, Stater Bros., who was formerly an employee of Thriftimart.

One of them Mr. Jacobs, was formerly at Market Basket, a Market Basket employee.

Mr. Irwin was a Crawford's employee.

Mr. Fleishman was a Shopper's employee.

Mr. Carpenter was a Highlands' employee.

In addition to those specific individuals, the affidavit—
[fol. 2544] The Court: Before you pass to that, counsel, most of these openings have been over a period of the last four or five or six years, haven't they? Am I incorrect about that?

Mr. Vaughn: There are many who have, yes, your Honor.

The Court: I say the most of them.

Mr. Vaughn: Yes, I would say so. But the ones—

The Court: The reason I asked the question is to relate back to prior to the filing date on approximately how many, what percentage of those were opening those stores. And then bring it up past the filing date of the complaint and see how many, if that continuation was in effect. Do you follow me?

Mr. Vaughn: I think I can probably answer your ques-

tion if you would like me to go over this list again.

The Court: If you would, I would like to know.

Mr. Vaughn: Mr. Elkin, as I remember, opened a store in 1958.

Mr. Goodnight opened the first of his Michaels Markets in 1960, after the merger.

Mr. Wood opened the first of his markets right after Mr.—I think it was 1955, '54 or '55.

Mr. Goldstein opened his first market in October 1962, [fol. 2545] Mr. Hughes opened his first market in about 1955, or '52.

Mr. Goldberg opened his first market in 1962, although he had been a chain executive with King Cole before that time.

Mr. Irwin opened his market in 1962.

As to the defendants' witnesses, Mr. Jenkins recently opened up a market. He has had a number of them, if I recall correctly.

Mr. Irwin—it was after 1950, I think it was 1954.

The Court: Well, what I was getting at, counsel, was to find out if there had been any sudden change in this trend. In other words, something that existed prior to the date of the complaint, and whether or not it was continuing up to the time of the filing and on after.

Mr. Vaughn: I see nothing in the record to indicate that. And, your Honor, I really believe that the Von's-Shopping Bag merger has proved to be an insignificant event in the history of grocery retailing in Los Angeles. I do not know of one discernible change in competition, competitors, or anything else that is attributable to that merger. And I don't believe that the record shows that there is a single thing. It is like dropping a pebble into a roaring stream. It has had no effect whatsoever on [fol. 2546] competition.

The Court: Well, counsel, the question: What effect?

Mr. Vaughn: I don't know whether the record shows any. There certainly has been no lessening of competition.

The Court: Well, the—

Mr. Alsup: Could I add to that, your Honor—I am sorry to interrupt.

The Court: That is all right. What I was about to say, I have before me here—I suppose you gentlemen have

seen it—this is the Grocers' Journal. I wonder if I might pass it down to you and ask you if you gentlemen have seen that. Southern California Grocers' Journal, February 27, 1964.

And I am not going on the number of stores as much as I am the names, trying to remember the names from the record.

This gives the national chains and the regional chains. I don't think we got into too much testimony as to the regional chains.

Then there is something they call the county chains. You might take a look at that. As I remember it, the evidence didn't break it down as it is broken down in that Journal.

Mr. Alsop: Looking on pages 3 and 6 of that [fol. 2547] Southern California Grocers Journal, your Honor, there is also a further breakdown, in addition to that, that appears on the cover.

The Court: Is there any objection to using this document for the purpose of reference only?

Mr. Coyle: No, your Honor.

The Court: The Supreme Court goes out and reads documents and statements by economists and professors and what-not, and then refers to them in their footnotes. Maybe a District Court can do the same thing. So I will use this as a footnote.

Mr. Coyle: I don't know what it proves, your Honor.

The Court: I am not saying it proves anything. I am merely trying to find out some things about this case.

You know, I spend quite some time while I am trying cases reading this record. During the process of trying patent cases and all kinds of cases, criminal cases, admiralty cases, I am trying to read this record. And while I have made a lot of notes, I want to go back and try to assimilate in my mind what I have read.

I was using this outline more or less as a classification method.

Pass it back to me, please.

I want to ask some questions.

[fol. 2548] We did not have any evidence at all regarding county chains, did we?

Mr. Vaughn: We had evidence regarding what we called

local chains. I think they are the same thing, your Honor.

The Court: Was that intended to mean county chains, not including Orange County?

Mr. Vaughn: No, I don't believe that there was any evidence that was isolated as to a concern that might do business only in Los Angeles County. The local chains that we referred to were those that had most, if not all, of their stores in the Los Angeles Metropolitan Area.

Mr. Alsup: I think if your Honor will read across that front page of that Journal—

The Court: Yes, I know it, counsel. But I was trying to get in my mind the competitive situation as it existed prior to the filing of the case, and after the case went into trial. And I was trying to see how we developed the facts as respecting national chains, regional chains, and what they refer to as county chains.

I think we merely talked about 10 or more stores, did we not?

Mr. Alsup: Basically, yes, your Honor. And what they referred to there as county chains actually go beyond Los Angeles and Orange County if you—

[fol. 2549] The Court: Yes, I know they go into the other counties.

Mr. Alsup: Yes. And I think the regional ones are those which operate actually in more than the State of California.

The Court: All right. Well, I suppose it would be of no use to try to use that as a reference.

Mr. Vaughn: Your Honor, I might say that Exhibit AF attempts to trace the history in terms of number of stores that served the market for the top 20 chains as of 1960, from 1948 to 1960.

So we do have information there which might be compared to this information. There are also—I might call to your Honor's attention a document entitled "Small Business Reporter" put out by the Bank of America, which has an additional distance.

This is recently published, copyrighted in 1964. Additional statistics, additional observations about the grocery business in general and in Los Angeles in particular.

The Court: Well, I guess we had better not consider that. I wasn't going to consider these matters from an evidentiary standpoint.

I was trying to find something from the evidence before the court—I guess we have to break these situations [fol. 2550] down into the chains and the size of the chains, really. And then down to the single store.

So I think we have to follow what you have already done, those where it is single operators, single store operators, those with one or more, two or more, and so on.

I don't think we can avoid using that method.

Now—

Mr. Vaughn: I would be happy to try and answer any questions I can.

The Court: Well, what I am concerned about, one of the things is: Is there any evidence as to what happens to any of these stores who went out of business?

Mr. Vaughn: Yes, your Honor. The affidavit of Edward F. Pasini seems to me to be about as complete a statement in that regard as we can possibly get.

The Court: Yes.

Mr. Vaughn: We got the names and addresses of every store that the Board of Equalization said went out of business in 1960. And every store that went in business in 1960, that they said went in business in 1960 but was out of business by November of 1961.

Langendorf Bread Company, whose route salesmen were under the direction of Mr. Pasini went to each one of those [fol. 2551] locations. And it is set forth in his affidavit.

The Court: Yes, I remember generally the affidavit. But give me the particulars of it, will you, as to how many went out, and the reasons for it?

Mr. Vaughn: As to how many, your Honor, I think the stipulation is about as close as we can come to that, that we have already entered into.

The record shows that as of January 1, 1961—

The Court: No. I mean from the affidavits, counsel. What was said in that affidavit?

Mr. Vaughn: In that affidavit it was indicated that there were a number of stores that went out of business because of freeway construction. About 20 per cent of those that actually went out of business went out because of freeway discussion or other conditions, where either the store property itself or the surrounding community which it served.

Others went out because of fire.

Others went out because of loss of the lease.

Others went out because of the retirement or death of the owner. In one instance I recall where it was said the store had been closed because the owner died and his wife was touring the world.

The Court: As I remember it, we did not get any evidence into the case as to the discontinuance of stores by [fol. 2552] chains, large chains.

Mr. Vaughn: We did our best on that, your Honor. We worked on it, particularly since the conference in chambers last month. And we have not come up with any reliable statistics in that regard.

We can tell you that Safeway had a thousand stores in this community in 1920. It has 140 as of 1960. This is a trend that has gone on throughout the industry. Smaller stores that used to be the predominant means by which groceries were sold in this area, smaller stores have given way in part to larger supermarkets.

The Court: Well, I was rather surprised that no one offered in evidence—I don't know whether I can take judicial notice of the fact—but you know the automobile ownership of this country has changed considerably in the last 30 years.

Mr. Vaughn: Indeed it has, your Honor. I think the difference can be that people didn't used to have automobiles, the only way the housewife could get to the store was to walk.

The Court: Well, there are those that went on street-cars.

Mr. Vaughn: But it certainly limited the drawing area of a particular store, and limited the area that any particular grocer had to be concerned about. He didn't have [fol. 2553] to be concerned about a store a mile away, because his customers came from a few blocks away.

But with the advent of the automobile and the advent of supermarkets which provided parking space for these automobiles, then the neighborhood monopoly which small corner grocery stores enjoyed disappeared. He was now faced with the necessity of competing with stores a mile or more from his store. He no longer could sit back and take life easy. He now had to fight for his existence.

The Court: However, there was another situation the

record seemed to me to indicate, that cash and carry came into the program quite a bit, too. It used to be that the small store apparently had charge accounts, carried the neighborhood on credit.

Mr. Vaughn: I think that may have been true during the depression, your Honor.

The Court: I think probably it might have been the reason some of them went out of business.

Mr. Vaughn: Could be. But there has been a national trend.

The Court: Kind hearts may have caused the failure of the grocery business.

Mr. Vaughn: That is true. I think the increased competition that every grocer has to face as the vistas expand, and [fol. 2554] the area he has to worry about expands, some grocery stores may have gone out of business because they were no longer needed and he knew he was no longer patronized.

Others may have gone out of business because they could not meet the competition of the supermarket. They were used to this neighborhood monopoly and they could not adapt.

The Court: Well, what I am concerned about is, I want to know the trend here. What is the trend from these figures. What is this fact that the stipulation says we started out in—let me get the stipulation here—we started out in 1963, there were 3,590 stores.

Mr. Vaughn: Operated by people who owned them—

The Court: Single outlet stores.

Mr. Vaughn: Correct, your Honor.

The Court: There were 958 operated by multiple stores. Those are not necessarily large chains, they may be three stores, five stores, or 10 stores.

Now, the total was 4,548.

In 1962 there were 3,859 stores.

Mr. Vaughn: Now that is number of concerns, your Honor, not number of stores.

The Court: Concerns, yes, concerns.

Mr. Vaughn: That is not a comparable figure with the statistics in paragraph 2. Paragraphs 1 and 2 [fol. 2555] give you an exact comparison between 1961 and 1963.

The Court: Well, the number of concerns is 3,859. That includes large chains, is that right?

Mr. Vaughn: That is correct. So Von's would be one concern. Safeway would be one concern. That does not reflect the number of stores.

The Court: I see. Paragraph 1 I should have referred to first. Paragraph 1 shows that in 1961 there were 3,818 of the single store operators, is that right?

Mr. Vaughn: Yes, your Honor.

The Court: And then there were 923 of the multiple outlet stores.

Mr. Vaughn: Yes, your Honor.

The Court: Now the difference in 1963, January 1, would be approximately 100-odd stores, is that right?

Mr. Coyle: I believe 200.

The Court: Is there any evidence in the record as to what happened to those stores?

Mr. Coyle: It was about 200 instead of one.

The Court: All right, 200—200 or 300, whatever it is.

Is there any evidence in the record to indicate what happened to those stores?

Mr. Vaughn: I don't believe there is any specific evidence [fol. 2556] that would relate to those specific 200 or so stores. There is only the generalization that stores have gone out of business for the various reasons that we have cited. I don't know of any way to obtain that information.

The Court: Have they gone out of business?

Mr. Vaughn: Well, that is in doubt. You see, this Mr. Lehar's affidavit shows that the Board of Equalization, at least as to the portion which he reviewed, is 45 per cent inaccurate about the closing of the stores.

There are many stores on that list there that they said the Board of Equalization submitted, from which these statistics were taken, which were being operated as grocery stores, despite the fact that they were shown specifically as closed. And sometimes they were being operated by the very same people who had operated them at the outset.

So then you see—

The Court: Well, I take it, gentlemen, there is nothing in the record to show what happened when there is a change in name on a store, or when they are two stores combined, or when it is purchased by some other concern.

Mr. Vaughn: There is this in the record, your Honor: Whenever there is a change in name, this will ordinarily result in the Board's records in the elimination of one entity. So down goes the count by one.

[fol. 2557] The Court: Yes, that is true. I understand that.

Mr. Vaughn: The new entity gets the new sales tax permit. And as a result there is an increase of one.

One misleading thing in this statistic, however, is the fact that if a single store operator opens up a second new store, that results in a decline of one, in a single store operator, and an increase of two in the multiple store operators.

We have shown through the affidavits that there has been over the last 10 years a specific increase in the number of concerns operating only two, three or four stores.

The Court: There has been what?

Mr. Vaughn: A significant increase in the number of concerns operating two or three stores, from '56—if my memory serves me rightly—in 1952, or 1953, to 104 such concerns in 1962.

I would certainly like to apologize to your Honor for not having better statistics.

The Court: Well, you can't help that, counsel. As a matter of fact, these cases—this case, part of it, is in the realm of speculation. I don't know how far a court should go in speculating—I never thought it was supposed to speculate at all, I thought you were supposed to base your conclusions upon proved facts. And I am afraid we are entering an area where we have come to the [fol. 2558] point at least to where speculation is just as important as the evidence.

I frankly am very much concerned—I can't seem to put my hands on where there has been a substantial lessening of competition.

Mr. Vaughn: Neither can I, your Honor.

The Court: And I will offer the government another chance to point out to me—I have offered this several times and I have not received any communication to enlighten me on the subject.

Mr. Vaughn: Thank you, your Honor.

ARGUMENT ON BEHALF OF THE GOVERNMENT

Mr. Coyle: If your Honor please, the probability of the lessening competition arises from the fact that a growing, vigorous chain with 38 stores doing eighty-five million dollars worth of business in the Los Angeles Metropolitan Area was acquired by one of its competitors, and therefore was eliminated from that market.

That is the test that Congress meant the courts to apply. And the reason we object to this post-complaint evaluation—

The Court: Now, wait a minute. You are going—a minute ago I thought you agreed with me that the acquiring and acquired was not the test.

Mr. Coyle: But the elimination of this substantial factor in the area is the test. The elimination of a [fol. 2559] substantial factor is the test. That is the test.

The Court: What substantial factor?

Mr. Coyle: Shopping Bag. You had Shopping Bag and Von's, both competitive factors—

The Court: That was the old Section 7 test.

Mr. Coyle: Oh, no, I haven't made myself clear, your Honor.

The new test is that competition is stronger when there are more important factors in a given area.

The Court: That is pure theory.

Mr. Coyle: That is the premise of the Philadelphia Bank case.

The Court: It is pure theory, that is all it is, pure academic theory.

Mr. Coyle: The premise of the Act, and the first point under that premise is that when one big competitor in the area acquires another big competitor in the area, competition in that area is reduced by the elimination of that factor. And that will probably lessen the competition.

That is the Philadelphia Bank, Brown Shoe, and the Committee Report.

The Court: Well, Philadelphia, though, in that case—and I was surprised, really, and I am like Justice Holland now, nobody could be greater surprised than I was when that case came down, except possibly the government.

[fol. 2560] Mr. Coyle: We weren't surprised, your Honor. We knew——

The Court: After the appearances that I was familiar with that they made before the Committee in Washington, and the position that they took in this decision was quite revealing, most revealing.

But at any rate, I am afraid where I have difficulty in crossing over this bridge is that everything is a major premise based on a syllogism, a major premise assumed to be true. That is the trouble in this case. All major premises are stated and then assumed to be true. Of course, with a major premise you can prove anything, if you assume it to be true. If all you see is the blackness of the bird, therefore it is black. That is the way you go about it.

Mr. Coyle: Here is the Philadelphia Bank case, your Honor, page 363. The court says that:

“ . . . competition is likely to be greatest when there are many sellers, none of which have any significant market share, is common ground among most economists——”

The Court: That is a statement with a pure dictum——

Mr. Coyle: It was undoubtedly the premise of Congressional reasoning, your Honor, as applied to mergers.

[fol. 2561] The Court: That is pure dictum and I don't know if the gentleman, the distinguished gentleman who wrote that opinion, is right or not, but I don't think it necessarily follows:

The evidence in the case, there was no evidence in the case to support that as far as I could determine. And I think it is pure dictum in the case.

Mr. Coyle: I think that——

The Court: You are making the statement, and the statement is being made there that, in other words, you have a better competitive market if you have no—reduce it to its absurdity—if you have nothing but single store operators, then you have a better competitive market. That is what it amounts to, isn't that right?

Mr. Coyle: That is the premise, in a fragmented industry, that is what Justice Warren talked about in the Brown Shoe case.

The Court: Well, with all due respect to the Chief Justice, I think maybe that was just dictum in the case. I can't believe that there was anything in the case to support any conclusion of that kind.

Mr. Coyle: If you don't take this position, then you really get into speculation and conclusion and conjecture. How does anyone prove whether competition is more vigorous and less vigorous as of——

[fol. 2562] The Court: By facts, by facts.

Mr. Coyle: I don't know any fact that proves it and I am sure it is not the government's burden to prove that in four years between the time the complaint was filed and the time it got around to trial, three and a half years, that somehow, some way, competition was actually lessened in this market. If we have to prove that, we are back to the Sherman Act, and this new Act means nothing, because that is an impossible burden for the government to ever assume.

The Court: Well, counsel, if I take your major postulate, that is, that the economy is better to have single store operators, then I suppose I have to go along with you.

Mr. Coyle: I didn't say that that is my major postulate. I said that the premise of the Act, as the Supreme Court said, is competition is——

The Court: Let me ask you a question in that regard.

Mr. Coyle: All right.

The Court: Let me ask you a question, one that relates to the practical things of life.

How many individual store owners are able to give a 25-year lease and build a market to the sum of five or six hundred thousand dollars?

Mr. Coyle: I don't know, your Honor. I haven't made a study of that.

[fol. 2563] The Court: Well, you wouldn't have to make a study, counsel. Just common sense ought to tell you that the average individual grocer would have great difficulty in getting that type of finance.

So now what you are saying in effect is that because the chains can get financing, it has an unfair advantage, therefore it ought to be stamped out.

Mr. Coyle: I am not saying that at all, your Honor. I am saying that when Congress passed the amendment to

Section 7, it was concerned over growing concentration, and the fact that growing concentration resulted from mergers, at least in the judgment of the Congress, and that the Congress meant to stop mergers.

It didn't legislate against chains, it only meant to stop mergers of big competitive factors in a given market because it, in its experience, knew that when competitive factors merged in an important economic market, it did have a tendency toward increasing concentration, which would jeopardize—

The Court: There is a point, no doubt about it. But the question is did that point arise in this case at the time of the suit. That is the problem.

Mr. Coyle: That is the problem, your Honor. To answer the problem you look at the trend in the industry—

The Court: Yes, but you are making so many assumptions. You are asking me to make assumptions on the bare statistical information that I don't know that I can make, whether I am to assume that because the store went out of business it was forced out of business because of competition.

Mr. Coyle: I think the important thing is not why they went out, but the fact that more went out than came in, and the larger chains over the years have gotten a larger and larger share of the market. This is the kind of increase in concentration that Congress was alarmed at. And when a merger took place and contributed to that increase in concentration, Congress meant that that merger was to be halted. And there was a history of these mergers in this area, and they contributed to this increase in concentration. Mergers always contribute to increase in concentration, and if they are big mergers, they are illegal, if they are—

The Court: That is the trouble. What is big and what is small?

Mr. Coyle: We are right back to the market structure and the market share. When the two firms merge in a market share like the market we have, a market structure like the one we have here and the result, a result of having a share of 8.9 per cent, that is substantial in this market structure.

The Court: What does the record show, if you

[fol. 2565] recall—if it does show—how many single store operators were there in this area, in this relevant area, in 1950?

Mr. Coyle: Yes, your Honor, it does show that. Excuse me just a second.

The Court: Now we are looking for trends.

Mr. Coyle: The record shows that on January 1, 1950, there were 5,365 single outlet grocery stores, and 856 multiple outlet grocery stores, for a total of 6,221 stores. That is in 1950.

The Court: Just one second, counsel. Singles—and the multiples were 856.

Mr. Coyle: Right.

The Court: All right. Now, let's compare that with 10 years later.

Mr. Coyle: That is for the total of 6,221, your Honor.

The Court: Of what?

Mr. Coyle: The total was 6,221.

The Court: Yes.

Mr. Coyle: Yes.

The Court: Now, on your multiples, in 1961, which was in January 1961, there were 3,818—

Mr. Coyle: Singles.

The Court: Singles, that is correct, isn't it?

Mr. Coyle: That is correct, your Honor.

[fol. 2566] The Court: Now, you are asking me to assume that because of this difference here of about around—let's see, around fourteen or fifteen hundred stores, that I am to draw the conclusion that that came about by reason of the pressure of the chains.

Mr. Coyle: I am only asking the court to find that this happened, that more stores were going out of business than were coming into business during that period of time.

The Court: That is the thing that bothers me. What is the reason for it? Am I to just conclude that strictly because of the competitive situation—

Mr. Coyle: That is just one of the facts that demonstrates the increasing concentration in this area. It is part of the pattern of increase in concentration.

The Court: You completely disregard the fact that the supermarket—when did the supermarket come into being, counsel?

Mr. Coyle: I don't know what the court would define as a supermarket.

The Court: You know what I mean by a supermarket.

Mr. Coyle: No, I don't.

The Court: Don't you know who originated the supermarkets in this area? Don't you know when it began? All those problems have something to do with it.

[fol. 2567] The Ralphs Stores were not supermarkets. The Safeway Stores were not supermarkets.

And did you know that of these 1500 stores that went out of business between 1950 and 1960, how many were Safeway Stores?

Mr. Coyle: I didn't know—I know that there were more chain stores in 1960 than there were in 1950.

The Court: How many Safeway Stores were there in 1950?

Mr. Coyle: I don't know, your Honor.

The Court: Well, counsel, if you found out that a thousand of these stores that went out of business were Safeway Stores, were that change your impression of this competitive situation?

Mr. Coyle: No, your Honor, for this reason: My impression of this—it is not an impression—my conclusion as to this market structure situation is that you don't look at the number of stores that went out of business without also looking at the increasing market share represented by the chains. When you have these two factors going along side by side, when you have fewer stores and the chains with increasing market shares, you have a position of increasing concentration, a trend toward concentration.

And this is also accompanied by a history of mergers and acquisition in the area which have resulted in 73 per cent of the increase of the total market share of the big chains of the area.

You have all those things. You have a pattern of increasing concentration in the area.

The Court: But counsel, the thing I am trying to find out from the evidence is: What is the reason for this concentration? Is it just suppression of competition?

Mr. Coyle: One of the reasons is acquisition, acquisitions have increased this competition.

73 per cent of this increase in acquisitions, increase in concentration, results from acquisitions.

The Court: Where is the proof of that?

Mr. Coyle: In this testimony of these statistics submitted by Mr. Mueller of the FTC.

The Court: He says that these were acquisitions?

Mr. Coyle: He lists the acquisitions, yes, your Honor. Lists the acquisitions and shows the dollar sales of the acquired stores.

The Court: 73 per cent of what, counsel?

Mr. Coyle: 73 per cent of the increase in——

The Court: Oh, I see what you are talking about. You are talking about 73 per cent of the increase with the chains.

Mr. Coyle: That's right, your Honor.

[fol. 2569] The Court: That is a different thing. I misunderstood you.

Mr. Coyle: I am not——

The Court: Let's get back for a moment. How many Safeway Stores were in existence in 1950? I think the record shows that, doesn't it?

Mr. Coyle: I am not sure how many, your Honor——

Mr. Vaughn: I can get that for your Honor.

The Court: I would like to have it for the moment, as I remembered at one time the record shows that there were a thousand Safeway Stores in the city of Los Angeles.

Mr. Vaughn: It does show that in the '20s and the '30s——

Mr. Coyle: I think that was general testimony, your Honor.

Mr. Vaughn: We found that information unavailable for 1948, the earlier years. We have it in 1954.

The Court: What were there then?

Mr. Vaughn: 185, your Honor.

The Court: So from a thousand in 1920 they went down to what?

Mr. Vaughn: 185.

The Court: In 1950?

Mr. Vaughn: 1954.

The Court: 1954. So there you——

[fol. 2570] Mr. Coyle: This was long before we had any of these figures. I would doubt that the Safeway closing of

these small stores and opening new stores contributed to this decline that we have shown since 1950, because I don't think Safeway declined very much, if at all, since 1954.

Mr. Vaughn: Mr. Coyle, you don't know and I don't know, because the FBI couldn't get that information.

The Court: Well, what I am getting at is the record, there is an indication in the record that Ralphs Stores were closing stores and opening new stores, and Safeway was closing stores and opening new stores, all of these concerns were closing stores and opening new stores.

Now, if I am going to wade through a maze of what was really a disappearance of the stores because Safeway got rid of a market or Ralphs got rid of a market, or somebody got rid of it—

Mr. Coyle: Well, your Honor, this record does show this. I will read from the defendants' exhibit—we have problems with the exhibit. The exhibit showed that Von's in 1948 had 14 stores. By 1958 they had 27.

It shows that Shopping Bag had 15 stores in 1948 and by 1958 they had 34.

It shows that Ralphs had 32 stores in 1948 and by 1958 they had 38.

The Court: Now give me that figure again.

[fol. 2570-a] Mr. Coyle: Ralphs had 32 stores in 1948. By 1958 they had 38 stores. In other words, they had an increase of six stores.

The Court: Do you know how many in the meantime they closed, or got rid of?

Mr. Coyle: There is no doubt but chains every day close stores and they open stores, there is no question of that. That is part of the every day occurrence.

But it doesn't affect the structure of increase in concentration. When the 20 leading chains keep getting a larger and larger percentage—

The Court: You see what is happening is that the eyes of realism are being closed. There has been a complete change in communications, a complete change in the Los Angeles area. Absolutely it is not anything like what it was in 1940 or even in 1950, the change was taking place then.

Mr. Coyle: That is correct.

The Court: But there was a time in Los Angeles County

and environs when most everybody rode either a Yellow Street Car or a Red Street Car, by the thousands. And you don't see any of those cars on the streets now at all, do you?

Mr. Coyle: I haven't seen any.

The Court: That's right. The automobile has [fol. 2371] taken over. As a result of that, the supermarket, so-called, came into existence where they put in large parking areas—they didn't have a parking area at all for the small stores, people walked in usually, parked on the street if they had cars.

Now there has been a complete change in this community which overlooks the fact that we have developed into a community of small cities surrounding a large area which calls itself a city. And the greater population is not in Los Angeles City, but in the surroundings, all these areas.

People are traveling in automobiles to areas to shop. I think--what was the first supermarket that came about here, does anybody remember?

Mr. Alsup: I would say it was Piggly-Wiggly, your Honor.

The Court: Piggly-Wiggly was not a supermarket. It was a series of stores the same as—

Mr. Alsup: Richard Ralphs' affidavit, which we introduced into evidence, points out that his father and his uncle are generally credited with developing the supermarket.

The Court: I think Ben Servall might disagree with you on that.

Mr. Alsup: Well—

The Court: He might disagree with it because I [fol. 2572] think it is indicated in the record somewhere—I can't remember the name of the stores—but I remember the name Servall somewhere, who was one of the founders of a chain or a group of stores. Do you remember that?

Mr. Alsup: I don't recall from the record, but I do know, your Honor, that various people are given credit for it. But Richard Ralphs' affidavit refers to some book which generally credits his father and uncle with starting the supermarkets.

As I recall, that was in the late '30s, wasn't it?

The Court: I guess it doesn't make a lot of difference

who started it. But I suppose most all of the grocers will be immodest enough to take credit.

Mr. Vaughn: Just like they all take credit for——

The Court: How much more time do you want, counsel?

Mr. Coyle: If the court has any more questions, I will try to answer them.

The Court: Well, I am gravely concerned about the government's proof in the case. I will tell you very frankly.

Mr. Coyle: If your Honor please, I think we made the proof on the evidence, we made the proof on the facts. These are the issues that are most generally in dispute——

The Court: Well, I think we had better stop. The reporter has had a long session of it today and so have [fol. 2573] I. This morning we had one matter after another all morning.

So I think we had better continue at 10:00 o'clock tomorrow morning.

Here, counsel, is your Advance Sheet of the Lawyer's Edition.

Mr. Alsup: Thank you.

The Court: Is that satisfactory? Continued at 10:00 o'clock tomorrow morning?

Mr. Vaughn: Yes, your Honor.

The Court: All right. We will stand in recess.

(Whereupon, at 4:40 o'clock p. m., Monday, March 23, 1964, court was in recess until 10:00 o'clock a. m., Tuesday, March 24, 1964.)

[fols. 2574-2576] IN THE UNITED STATES DISTRICT COURT

Honorable CHARLES J. CARR, Judge Presiding

No. 336-60-CC Civil

[Title omitted]

Transcript of Proceedings—March 24, 1964

Place: Los Angeles, California.

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[fol. 2577] The Clerk: Case No. 336-60 CC Civil, United States v. Von's Grocery and others, for further proceedings.

The Court: Now, Mr. Coyle: yesterday I set this argument for the purpose of getting help. The court desires argument for one purpose only, and that is assistance. I was very tired after many, many matters on the calendar yesterday. And all I kept getting from you was generalities.

Now, today I want you to get down to specifics. And I also want to ask these defense counsel some questions.

But I want to get away from the language of the Supreme Court. I think I can read that as well as you can. I may not understand it as well as you do, but I can read. Now I want to get down to the facts of the case, what the proof was.

And the question is whether or not the Government has failed to prove that there will be a substantial lessening of competition. Now that is the problem in this case, is that right?

Mr. Coyle: Yes, your Honor.

The Court: Now if you will just listen a few moments, I have put to you some specific questions, I [fol. 2578] have been through these records, I have spent hours on them over a long period of time. I have made a lot of notes.

Now, if you will just take a pencil and make a note, I would like to have you—as I say, the purpose of argu-

ment is to assist the court. Not to tell a court what to do. All right. Now we will start.

In reviewing the Government's—all the affidavits of the Government witnesses—I believe there were, as I remember it—I have notes here, I will get them in just one moment—the Government's summary of the facts I will mention first.

On page 8 there is a statement that from 1950 to 1963 the stores decreased by 1673.

Now, the multiple outlet concerns increased by 102.

In 1950 there was 1.4 stores per thousand. In 1961 there was 7/10ths stores per thousand.

I don't think this is of great materiality, but in the beginning there were—rather, in 1960 there were only six of the Shopping Bag stores actually at a competitive distance—I am not talking about now about the relevant area or anything of that kind—I am talking about competition in terms of three or four miles, the driving area that, you will recall the testimony was that [fol. 2579] the average person drove three or four miles, up to three or four miles to shop.

And then the Government says on page 30 of the summary of facts, that the—the Government says that the decline in individual grocery stores resulted “largely from the increasing size of supermarkets and their large continually expanding dollar sales.”

I want some discussion on that as to how you reached that that is the sole reason for the decrease in individual grocers. It seems to me that wrapped up in that statement is a conclusion that is not necessarily supported by the evidence.

Now, the next point—did you get that, counsel?

Mr. Coyle: I am not sure what your Honor wants me to answer—

The Court: Well, you are making a flat statement that largely from the increased size of supermarkets and their expanding dollar sales, that this is the reason for the decline in individual grocery stores.

And I think the record indicates there are other things responsible. I'd like to have some discussion from you, how you contend that the evidence supports that conclusion.

The next point I would like some discussion on

—I don't think I need a whole lot, but I will be glad [fol. 2580] to hear from you—there is quite a strong statement made in the Government's contentions that single stores cannot get into the most desirable shopping centers "because of credit standing, et cetera, lessors want the big names."

Well, I think that is probably true. But what does that prove? It proves that because a man doesn't have as much money or credit rating that this is a lessening of competition? It may be a facet, I don't know. But I would like to have pointed out to me how you can expect anything different in a society where supposedly democracy was set up, not to equalize people, but to give people a chance to crawl above his neighbor, to outwit him—I don't mean in a crooked fashion, but outsmart him, overcome him, and become more successful. That is the reason this democracy was formed, not to equalize people.

But apparently our whole trend now is everybody has got to be equalized. Well, if we come to that, then I don't know what you are going to do about the bench. You are going to have an awful problem trying to equalize the judges. I suppose it will have to be downward, I don't know.

At any rate, now the next thing I want some discussion about, you make the statement on page 34 that the Von's-Shopping Bag merger will make the company [fol. 2581] more in demand by shopping centers to the detriment of small operators.

Mr. Coyle: If your Honor please, I don't have that document before me.

The Court: Well, you can make notes of the points. I am sure I didn't dream it up. It is in there, counsel, on page 34.

Mr. Coyle: Yes, your Honor.

The Court: You make this assertion, which to me is rather strikingly questionable. In other words, just because a company can get a better credit rating that this is a—first of all, Von's apparently had a good enough credit rating, apparently in the beginning and so did Shopping Bag—to get in any shopping center. And I would like you to just touch upon that.

Now, then, the tenor of the Government witnesses, as I

see it, is that the grocery industry is dominated by the chains. That is what I gather from your contention, that the prices are set by the chains.

I say the tenor now, I am not saying you make that positive assertion.

And then, of course, the point I have just made that the independents cannot get into the shopping centers. So I think that is probably true generally, unless they are large enough to have a financial standing.

[fol. 2582] If I were going to buy tomorrow a shopping center to get 7.8 per cent net-net-net, as these real estate people call it—which is nothing in the world but net—I would certainly prefer to have a Safeway on the lease than I would to have one individual out here who, when he dies, it goes into an estate and his wife—then you would have to deal with her. I certainly would prefer to have my money secured by some large concern. That is just common sense.

Now, I want to ask you, too, I have forgotten the exhibit number, it is the chart I think we were using yesterday which shows all of the numbers of stores. Do you remember the chart number, exhibit number?

Mr. Vaughn: Exhibit AN, if you are referring to the defendants' exhibit, your Honor.

The Court: Yes, that's right. AN. Later I want to ask you a question in regard to that.

Now, you have never said why you didn't cross examine any of the defendants' industry witnesses. I have never understood why you didn't.

Mr. Coyle: We discussed that in our memorandum I think, your Honor.

The Court: Yes. But you just passed them off as immaterial. Is that an answer?

Mr. Coyle: I think that is a good answer.

[fol. 2583] The Court: Well, I don't think it is at all, not at all.

Mr. Coyle: They didn't prove a thing, your Honor.

The Court: That is your opinion, counsel. If I take your conclusions of your individual people who said in the future that competition will be lessened, that is nothing but a conclusion of one witness, which has little or no effect. If you want to take that attitude.

Mr. Coyle: I think that is correct, your Honor. These conclusions of the witnesses as to the ultimate issues of fact have no effect——

The Court: All right. If that is the case then where is your evidence to sustain your proposition that there will probably be a substantial lessening of competition? That is what I would like to know. I want to have that evidence laid out for me, before me.

Now, before you start, there is one other thing, I want to give you a chance to attack some of the things that the defendant contends.

Now, you concede, of course, that the burden is upon the Government.

Mr. Coyle: Yes, sir.

The Court: To prove here that there is a probable sub-[fol. 2584] stantial lessening of competition in the relevant area, is that right?

Mr. Coyle: That is correct, your Honor.

The Court: Now, then,——

Mr. Coyle: I might say, your Honor, that overnight I prepared a statement here which I think sets forth our position on these various questions that the court seemed to be asking yesterday. And I think it might be helpful if I could read that to you first.

The Court: Well, I find generally reading statements is like a politician who is making a speech and does not want to reveal his position. That is usually what a written statement means to me.

Mr. Coyle: No, your Honor——

The Court: I prefer the Socratic discussion to try to learn something.

Mr. Coyle: Well, this statement——

The Court: I will let you read it, but just be patient a moment. I want to give you some things to shoot at. When I was practicing law I appreciated a judge letting me know what he was thinking so I could argue with him. You don't seem to want to do that. You seem to want to give me general statements.

Now, 18 of the Government's witnesses entered the grocery business since 1948. Yet these are the people who testified to a conclusion that the business is [fol. 2585] becoming more or less a monopoly, yet these

very 18 people who testified all went into business and apparently succeeded.

Mr. Coyle: Well, your Honor, on that—

The Court: Now, the next thing—you can answer all of these if you will just make notes. I am going to listen to you.

Now, you might take as an example since 1954, I believe the witness' name was Wood, who built up a ten-store chain since 1954. And I think counsel mentioned yesterday there was a witness by the name of Goodnight, something of that kind. Was that the name?

Mr. Vaughn: That is correct, your Honor, yes.

The Court: He has built up seven since 1959.

Mr. Vaughn: 1961.

The Court: I have it 1959 from my notes.

Mr. Alsop: He actually left Alpha Beta, your Honor, in 1959. And opened his first store I think in March of 1960.

The Court: I see. All right. Now, then, I would like to have you answer the question, too, why these executives, the testimony clearly discloses that many executives have been leaving these chain stores and going out and opening individual stores and growing into 1, 2, 3 units.

And how it happens that a man with the experience [fol. 2586] of the manager of a chain organization will move out into a market that he feels is choked to such a point that there is no opportunity. This to me is just incomprehensible.

After all, I realize the courts are not too experienced in business. And I know that they forget sometimes that irrespective of all the ills and faults the businessman has brought on, he still did help build this country. And I am wondering why it is that these executives—and there are several—who moved out from those chain organizations to go into individual operations. To me it is astounding that a man with that experience would move into a monopolistic situation.

The next thing—and I think I am about finished—is the—oh, yes, there is another matter I would like to have you answer. Now, these matters I want specific answers, not generalities.

I would like to have you analyze for me why the presi-

dent of Certified would testify that he doesn't anticipate any lessening of competition when he knows, counsel, that if his individual grocers were affected it would certainly affect Certified. Is that correct? Because Certified sells to the small grocers, as a general rule. That is the primary source of his business.

Now, another thing that strikes me is—and I got this somewhere in the record—there were 24 chains [fol. 2587] operating in 1963 that were not in business in 1953. Is that an erroneous statement?

Mr. Coyle: I am not familiar with the exhibit—

Mr. Vaughn: Perhaps I can correct that, your Honor. There were 24 chains, the figure 24—

The Court: I didn't get that in this argument. But I made these notes from something I saw on the record.

Mr. Vaughn: Yes, it comes from the affidavit of Godfrey M. Lebbhar.

As of 1952 there were ten chains in Los Angeles operating ten or more stores.

As of 1962 there were 24 chains operating ten or more stores.

The Court: Only an increase then of 14.

Mr. Vaughn: That's right, an increase of 14. Of those 14, seven had no stores, or only one store as of 1953.

The Court: I would like some comment on that, counsel for the Government.

These are things that you can be very helpful to me on.

Now, another thing that I got—I have 40, I don't know where I got this—it is note 40 of mine. But I have a statement here, the total market share of the top 3, 4, and 5—[fol. 2588] concerns—I don't know why I put it 3, 4 and 5—declined between 1952 and 1960.

I wonder if someone could enlighten me on my own notes there. I got that somewhere in the record.

Mr. Coyle: I think there is an exhibit that shows that, your Honor.

The Court: I wish you would please comment on that; will you make a note, please.

Mr. Coyle: Yes.

The Court: Now one other thing—

Mr. Coyle: Excuse me, your Honor.

The Court: Yes.

Mr. Coyle: What does that note say, which year? Does it say?

The Court: That is between 1952 and 1960.

And I have one other note, and I believe that is it, counsel, except I want to add one thing about your contention as to the determination of the court as to the date of filing of the complaint.

The next note I have is that—I believe this was the witness Marshall. Was there a witness Marshall?

Mr. Coyle: The Board of Equalization—

The Court: Yes, that's right. And that was to the effect that the leading 20 chains opened 67 new stores—and I have 1960. Now, that is in that year, I take it, in the year 1960. [fol. 2589] Now, the single store operators opened in the same year 171 stores, according to that testimony. Now is that correct?

Mr. Alsup: I think the single store operators and the two, three-store chains operated 171—

The Court: Not only operated, I mean opened.

Mr. Alsup: Opened. I believe the figure for the single store operators, as such, as 119, your Honor.

The Court: All right, I see. Let me put that down. Single store, single would be 119. But the single, including the 171, would be the two, three and four stores, is that right?

Mr. Alsup: I am sorry, your Honor. I think my figures are incorrect. The single store operators operated—

The Court: Not operated—

Mr. Alsup: —opened 128.

The Court: 128.

Mr. Alsup: All chains, all chain stores together opened 119. The leading 20—

The Court: Well, I think I have enough for the point for Mr. Coyle to comment on. This is the point I want commented on.

Mr. Coyle: I wonder if counsel would indicate [fol. 2590] that exhibit number.

Mr. Alsup: That is Government's Exhibit 37.

The Court: No. 37.

Mr. Coyle: 37. Thank you. I am sending for these exhibits, your Honor.

Mr. Vaughn: 36.

Mr. Alsup: 36, I am sorry. I beg your pardon. Government's 36.

The Court: 36.

Mr. Alsup: I think it should also be pointed out that these 128 single store operators were people who apparently entered the business in 1960, because they were operating no other stores.

The Court: That is my understanding.

Mr. Alsup: Yes.

The Court: But I want comment on that, on how, I want comment on how in a community, in a relevant trade area that is so depressed and crushed down by this anticompetitive thing, that can open 128 stores, can open single store operators—of course, I realize people are optimistic, some open up to go broke. But I would like comment.

Now one thing further and you may take over.

Mr. Vaughn: Your Honor—

The Court: Yes.

[fol. 2591] Mr. Vaughn: Your Honor, on that point you might also like to know that Government's Exhibit 38 shows that of the 119 chain openings, 67 were by the top 20 chains.

The Court: Let me see if I understand you right. There were all told how many openings in 1960?

Mr. Vaughn: 246.

The Court: Let me put that down. 1960, two hundred—how many?

Mr. Vaughn: —forty-six; 246.

The Court: 246. Now, then, the chains, the leading 20 chains opened 67, is that right?

Mr. Vaughn: That is correct. The remaining multiple outlets opened 52.

The Court: "Multiple outlets" meaning —

Mr. Alsup: Smaller chains.

The Court: Smaller chains, three, four, five—up to ten, is that right?

Mr. Alsup: That is right, anything that is not in the top 20.

The Court: And the number opened?

Mr. Alsup: 52.

The Court: 52. Now, then—

Mr. Alsup: And the single outlet concerns—

The Court: 128, right?

[fol. 2592] Mr. Alsup: 128.

The Court: All right. Now, counsel, I have re-read the DuPont case. Maybe we misunderstand each other yesterday. The Supreme Court just flatly, right in the opinion, considers facts as late as 1955, even in the footnote. It puts in a table—I don't know where the table came from, whether it came from the evidence or not, we have arrived at a time in this country when the courts just add, sometimes they add things by reaching out and getting statistics and facts.

And on page 595 the court, note 16, puts Moody's Industrial List of General Motors' proportion of the industry up through 1955. Now, this complaint was filed in 1949.

Now, I agree with you that the case says that the question before the court, as set out on page 589, is that the law was for the purpose "to arrest their incipient restraint or monopoly in the relevant market which as a reasonable probability appear at the time of suit likely to result from the acquisition by one corporation—" and so forth.

Now, at the time of suit I can't believe that a court would foreclose from considering evidence after the filing date of the suit in an aid determining the probability.

[fol. 2593] So do you disagree with that?

Mr. Coyle: Yes, your Honor, I disagree with that to this extent—

The Court: Well, you will have to get the Supreme Court to change it, as far as this court is concerned.

Mr. Coyle: —to this extent, your Honor, and I was going to cover it in this statement I was prepared to give you.

The Court: All right, go ahead. You have the floor now.

Mr. Coyle: All right. If your Honor please, I think that there are four questions which were raised yesterday which go to the heart of this case. Those questions are:

1. On what does the Government base its proof that this merger violated Section 7?

The second question is: Is it part of the Government's burden to prove an actual lessening in the vigor of competition since the merger?

The Court: There never was any question of that kind posed in this case. Nobody said you had to prove an actual lessening.

Mr. Coyle: Yes.

The Court: The cases all hold—and I understand [fol. 2594] them to hold—the Supreme Court says there must be a probability.

Mr. Coyle: All right. And then the third question is: What would be the effect of any evidence which the Government might have introduced to show that there had been actual lessening in the vigor of competition since the merger.

And the fourth question is: What about the defendants' evidence on the record relating to the period before and since the merger?

I think those are the four questions, the four basic questions, that will control this litigation.

Now, in answer to the first question: What does the Government base its proof that the merger violates amended Section 7? I would answer this question by saying we base our proof on four basic factual points which are uncontroverted. The first point is that retail grocery distributors in the Los Angeles metropolitan area constitutes the relevant line of commerce and relevant section of the country, and that this is a substantial market——

The Court: Nobody is disputing that, are they?

Mr. Coyle: That is the first point.

The Court: I don't think there is any dispute in the case about that.

[fol. 2595] Mr. Coyle: I don't think there is either.

The Court: All right. Let's move on to something that is disputed.

Mr. Coyle: All right. The second point is that over the years there has been an increase in concentration in the distribution of groceries and related products in the Los Angeles metropolitan area. And this is demonstrated by the following facts:——

The Court: Well, now, you see, there is one of those what I call glittering generalities. But go ahead. I will listen to what supports it.

Mr. Coyle: All right.

The Court: It is so general—we have reached an age in this country where everything is done by semantics. And I just have a mind that likes to get down and reduce things to its lowest common denominator and put it in simple sixth grade English, if possible—not the high echelon English.

I think I have read probably as much of the good English as some others have read, but I don't attempt to duplicate it.

Go ahead.

Mr. Coyle: The facts which establish this increased concentration are the increase in the percentage market shares represented by the large chains, the important [fol. 2596] part played by mergers in increasing the market share of the large chains, and the absorption of many independent stores resulting in fewer firms controlling a larger share of the market.

And the third basic point on which we base our charge of illegality is that prior to the merger Von's and Shopping Bag were each substantial and significant factors in the general competition in the Los Angeles metropolitan area.

And the fourth point on which we would base our charge of illegality is that the merger produced the following effects:

Shopping Bag with its 38 supermarkets and annual sales in excess of \$84,000,000.00 was eliminated as an independent factor in the general competition of the Los Angeles metropolitan area—

The Court: Now there we go with a general statement that I don't understand. That is a general statement. Will you please break it down for me and explain what that means, "factor."

Mr. Coyle: It means that prior to the merger Shopping Bag was operating as an independent corporation in the Los Angeles area.

The Court: That part I understand, counsel.

Mr. Coyle: They had 38 supermarkets and their [fol. 2597] sales were over \$84,000,000.00 It was one of these firms which was playing a part in the competitive pattern of the Los Angeles metropolitan area. It was—

The Court: I understand that. What I am talking about is: Where was—what disappeared from the scene economically?

Mr. Coyle: Shopping Bag as an independent corporation.

The Court: Is that all?

Mr. Coyle: That is enough, your Honor, yes.

The Court: It is enough!

Mr. Coyle: That is enough, yes, your Honor.

The Court: It is enough!

Mr. Coyle: That is what disappeared in the Philadelphia Bank case. That is what disappeared in the Brown Shoe case when Brown acquired Kinney's Shoe Stores.

The Court: You don't think the percentages make any difference? The Philadelphia Bank case, you remember the percentages?

Mr. Coyle: Yes, sir. 30 per cent, or thereabouts.

The Court: Thereabouts, counsel? 30 per cent or thereabouts?

Mr. Coyle: The Supreme Court settled for 30 per cent. [fol. 2598] The Court: The Philadelphia Bank case? In the Philadelphia Bank case, they were the second and third largest, and when they combined they had 36 per cent—you say 30 or thereabouts, that is quite a difference.

Here you are talking about 4 per cent making the difference in the case.

Mr. Coyle: Talking about 8.9 per cent.

The Court: Combined, yes.

Mr. Coyle: Yes.

The Court: Combined. But now then, another thing you are overlooking is that the Philadelphia National Bank and the second largest bank would have had 59 per cent of the total assets. You don't have anything that comes anywhere near that in this case. That is the reason I asked you the question yesterday: Where does the degree take over? The statement says 9 per cent, 15 per cent, 30 per cent. When do we approach the apogee, I guess is the word, I don't know, where the thing starts to turn over.

Mr. Coyle: Certainly the Philadelphia Bank case says that 30 per cent is not controlling, it could be less than 30 per cent and you would still have a violation. It says that quite clearly in footnote 49.

The Court: I noticed in one of the footnotes in one of the cases not long ago they overruled all previous cases [fol. 2599] inconsistent with this opinion and they didn't name the case. I am wondering what cases they were.

Mr. Coyle: This is footnote 31, your Honor, it says:

“ . . . Needless to say the fact that a merger results in a less than 30 per cent market share, or in

a less substantial increase in concentration than in the instant case does not raise the inference that the merger is not violating " * * " and et cetera.

Then they cite the Brown Shoe case. Then you turn to the Brown Shoe and in Brown Shoe Brown was the manufacturer. They had about 5 per cent and Kinney had about a half of a percent. As retailers on a nationwide basis, I think Brown had about 1 per cent and Kinney had about 3 per cent.

The Court: Yes. But you had a combination there, counsel. You had both horizontal and vertical. You had a manufacturer coming in and taking over the, substituting itself in the place of suppliers. So you did have a combination of things there.

Mr. Coyle: But you have both horizontal and vertical cases. But in a horizontal case, in many cities, Minneapolis Kinney had 5 per cent and Brown had 3 per cent.

The Court: All right. Go ahead.

[fol. 2600] Mr. Coyle: So that you had very small percentages in those cities in Brown Shoe, smaller than the percentages here.

All right. The second thing that makes this merger illegal, in our judgment, is the fact that as a result of it concentration in the area was further increased. And the third thing is that a single corporation controlling 8.9 per cent of all the retail grocery distribution in the Los Angeles metropolitan area—

The Court: In other words, that per cent is a determinative factor, in your opinion?

Mr. Coyle: No, that per cent in—well, when considered in conjunction with the whole market structure, with the history of this market structure and the trend oward history of this market and the history of mergers in this market, you have to look at all of those factors to determine whether or not 8.9 per cent is substantial. The court has to look at the fact that this market was fragmented—

The Court: I don't know what you mean by "fragmented."

Mr. Coyle: It was made up of many firms, and it was

moving towards the makeup of a few firms controlling more and more shares of the market.

The Court: Counsel, I wonder how much the [fol. 2601] economic structure of the country, what effect this had on this grocery chain.

You know, since—a lot of people don't realize it—but since about 1941, a man who never had any business experience at all, who had just a good, solid head, he doesn't have to be too intelligent, could jump—could have jumped, rather, into most any business and done all right. I guess you concede that, don't you?

Mr. Coyle: Well—

The Court: In the war economy.

Mr. Coyle: There were boom times, your Honor.

The Court: Yes. We have got people in business today that really, in normal times, probably wouldn't keep their doors open a week.

And I wonder what consideration should be given to the economic structure during these times. Is it to be completely disregarded?

Mr. Coyle: I think the economic structure clearly is here, once you look at it. The structure is changed, a lot of independents and a lot of entities to fewer entities and a larger market share being controlled by fewer and fewer corporations.

The Court: You completely disregard and overlook the fact that stores that have been opened by independents [fol. 2602] are usually much larger stores today than they used to be. It used to be the little corner grocery store. Today when an independent opens up, in many cases, it is as big as the chain store.

Now, if you can't have as many of the big stores, the supermarket stores, or large stores as you have small, one-room grocery stores back in times past. You completely disregard that fact.

Mr. Coyle: No, your Honor, I don't disregard that fact. And when we get around to discussing these differences defense counsel mentioned, they show pretty definitely that most of the new openings of the large stores are by the chains, and the openings of the smaller stores are by the independents. But the chains represent the bulk of all sales by new stores.

The Court: What do you mean by "bulk?"

Mr. Coyle: Let me get the exhibit, your Honor.

The Court: Yes. What percentage in sales do the chains represent now, all told? I am talking about the ten leading chains.

Mr. Coyle: On the new openings—

The Court: No, the whole business.

Mr. Coyle: 43 per cent, we decided yesterday, your Honor.

The Court: The ten do?

Mr. Coyle: Yes, and 20 to 56 per cent.

[fol. 2603] The Court: That is correct. 43 per cent, I believe that is right.

Mr. Coyle: Yes. In 1956 the—

The Court: That was the case when the suit was in progress, but I think it is changed now.

Mr. Coyle: There is no evidence to that effect, your Honor.

The Court: You know, the Government is awfully technical about evidence when it is against it. But when it is for you you can drag in most anything. You can bring it in if it is just a shirt with something written on the cuff. It amazes me, the approach in these cases. I am really amazed. Your job, as the man representing the Government, is to do justice. Not just to win a case.

Mr. Coyle: That is what I am trying to do, your Honor. Right, your Honor.

Government's Exhibit 43, which is one of the same series of exhibits—

The Court: Yes.

Mr. Coyle: —shows that in 1960 the stores opened by the ten largest chains resulted in—or accounted for 46.6 per cent of all sales by newly opened stores.

That the stores opened by the next ten largest chains accounted for 21.2 per cent of all sales by newly [fol. 2604] opened stores.

The Court: Give me that figure again, please.

Mr. Coyle: 21.2.

The Court: 21.2.

Mr. Coyle: Yes.

The Court: Those are the next ten?

Mr. Coyle: The next ten.

The Court: All right.

Mr. Coyle: Yes. That the remaining chains, that is, the smaller chains, accounted for 20.4 per cent.

The Court: Now, there is where some confusion comes in. By smaller chains, you mean two, three, four stores?

Mr. Coyle: Yes, your Honor.

The Court: I see.

Mr. Coyle: Chains of two or more stores, not part of the top 20 chains.

The Court: Yes.

Mr. Coyle: So that the total sales by the 20 largest chains represented 67.8 per cent of all sales by newly opened stores.

The Court: There we go with that again. You can take adjectives and do anything with them. Adverbs and adjectives can hang anybody. The 20 largest chains, 30 largest chains, this two, three and four stores, is that [fol. 2605] a large chain?

Mr. Coyle: The 20 largest chains have more than two, three or four stores. There may be some of the top 20 that don't have ten stores, but most of them have ten or more stores.

The Court: Well, I thought the ten, the next ten chains had anywhere from five to ten stores.

Mr. Coyle: No, no, the next ten, the next ten would have, I would say, anywhere from seven to, I would hate to guess, but I would say from seven to fifteen stores.

The Court: All right. I just wonder, in Los Angeles and Orange Counties I think—well, let's take the county chains, I don't know whether you put evidence in, for example, as to the number of—I think there was evidence on Stater Bros., wasn't there?

Mr. Coyle: There may have been some.

The Court: I think Stater Bros. had about six stores in Los Angeles and about three in Orange, if I remember. Then there was the Michael Markets—were they mentioned in the record?

Mr. Vaughn: That is Mr. Goodnight's organization.

The Court: Those are seven stores and they are all in Orange County, none of them in Los Angeles, [fol. 2606] are there?

Mr. Vaughn: No, not Los Angeles.

The Court: And then this Alexander is listed as a chain. I believe there were—I don't remember whether that was listed or how many.

The Big Bear Market is listed as a county chain, but I don't know whether you put in any evidence, as I remember it there were no stores in either Los Angeles or Orange Counties.

Mr. Alsup: That is correct, your Honor.

The Court: Yet it is listed as a chain.

Mr. Coyle: It is listed by whom as a chain, your Honor?

The Court: Somewhere in the record I got the impression that it was called a chain. It has no stores in the relevant area at all.

Mr. Coyle: There may be a Big Bear discount house, I am not certain——

The Court: I think Big Bear is right up here at Big Bear Lake in San Bernardino County. That is probably what it is, it is out of the relevant area.

Mr. Coyle: I don't know how it got into the case.

The Court: I don't know either, but I remember it is listed as a chain somewhere. And if it is a chain [fol. 2607] it is a chain zero. It has no stores in the relevant area.

Mr. Coyle: I am sure none of our exhibits mentioned Big Bear as a chain.

The Court: All right. I thought I got it——

Mr. Coyle: I am pretty sure that our exhibits were checked with the defendants, and I am sure——

The Court: It may have been in one of the affidavits.

Mr. Coyle: It may have been in one of the affidavits.

The Court: I think so.

Mr. Coyle: Or in one of the depositions, your Honor.

The Court: But the word "chain" is like all generalizations. It is difficult to take words of general meaning and understand what they actually mean.

Mr. Coyle: Yes, your Honor.

The Court: I understand, when you say "chain," you get up to ten or more stores, yes, certainly, it means a chain. But how about a store like—I believe there was some testimony about Jurgensen's.

Mr. Coyle: Yes, your Honor.

The Court: Jergenson has, as I remember from the record, about eight stores.

[fol. 2608] Mr. Coyle: Yes, I feel that it will be classed in this remaining multiple outlet. He will be below the top 20 chains, but he will be—anyhow, your Honor, this is the same terminology as counsel was using—

The Court: I am not criticizing you. The terminology is what makes these cases difficult.

Mr. Coyle: Yes.

The Court: And it is in the opinion of the courts, general terminology.

Mr. Coyle: And does definitely show that the ten largest chains, the stores opened by the ten largest chains account for 46.6 per cent of all sales by newly opened stores.

The Court: That is quite a different situation from the Philadelphia Bank case.

Mr. Coyle: I don't think in the Philadelphia Bank case the percentage represented by—of all new openings by the ten largest banks.

The second question which I believe should be considered, and the court indicated there is no dispute on it, is whether the Government should be obliged to prove that there has been an actual lessening in the vigor of competition in this area since the merger.

The Court: Why waste time on that?

Mr. Coyle: Very well, your Honor.

[fol. 2609] Then it is taken for granted that there is no burden on the Government to—

The Court: Counsel, every case you have read, you have read it many times, I am sure, says the same thing.

Mr. Coyle: All right.

The Court: So there is no doubt about that. It has to be a reasonable probability, as I understand it.

Mr. Coyle: Then if the Government is not obliged to show that there has been an actual lessening in the vigor of competition since the merger, the next question is: What will be the effect of any evidence which the Government might have introduced to show that there had been an actual lessening in the vigor of competition?

The Court: To show that there was no reasonable probability.

Mr. Coyle: Of anything the Government may have introduced.

The Court: Either one, either side, any evidence that would come after 1960, the filing of the complaint.

Mr. Coyle: The Government's evidence would be to show that there had been an actual lessening of competition since the merger. And to that extent the [fol. 2610] Government would be going beyond its burden of proof—

The Court: There is no rule of law that prevents a party from going beyond.

Mr. Coyle: That is correct.

The Court: The rule of proof, if he wants to make a real good case, a good lawyer will oftentimes prove much more than he has to prove to prove the case.

Mr. Coyle: But a lawyer is never required to prove more than just to go beyond—

The Court: I believe that is a correct statement of the law.

Mr. Coyle: And the function of the defendant is to rebut the Government's case. And if the Government is not required to prove that there has been an actual lessening of competition since the merger, and the defendant doesn't rebut that case by showing that the Government hasn't proven something that is not required to prove—

The Court: You can't, I am afraid, channel it down to that narrow a situation. I think any evidence during the pendency of the suit which may reflect upon the reasonable probability is admissible evidence, evidence to be considered.

Mr. Coyle: If that were so, then the Government would be forced back to the burden of proof of proving a natural [fol. 2611] lessening of competition.

The Court: I didn't say that at all. This evidence is only to reflect upon the reasonable probability, not that there has been a lessening, insofar as it reflects upon the reasonable probability.

Mr. Coyle: Then the Government can counter that evidence so we would have to show—

The Court: You had your privilege, all you had to do was to offer the proof.

Mr. Coyle: To go beyond our burden of proof, your Honor.

The Court: You can call it what you wish, but you had the full opportunity to present such proof as would help show what the reasonable probability was.

Mr. Coyle: I can't see how it is our position——

The Court: Well, if you don't see it, counsel, take up something else.

Mr. Coyle: That is our position anyhow, your Honor.

The Court: I understand your position and I am not going along with your position in that regard.

Mr. Coyle: Yes, your Honor.

Well, then, our final position is in any event, what about the defendants' evidence in the record relating to the period both before and after the merger? I think that is [fol. 2612] what your Honor had reference to that he wants me to discuss.

Our answer to this question is that this evidence is not only irrelevant for the purpose——

The Court: Which evidence?

Mr. Coyle: Both the post-complaint evidence and——

The Court: About what, counsel? You mean none of the evidence of the defendants is to be considered? Is that what you are saying?

Mr. Coyle: Well, we say that in any event it does not meet or rebut the Government's case as established.

The Court: All right. Go ahead.

Mr. Coyle: First, much of the evidence relates to new entrants before and since the merger. But there is no evidence that these new entrants either before or since the merger, have offset the trend toward concentration in the industry.

The Court: You say there is no evidence? That is a rather broad statement.

Mr. Coyle: No, your Honor. The decline in the number of stores has gone on, the increase in the market share of the leading chains went on. That is what proves the increase in concentration.

The Court: Well, it may to you, counsel, but there are [fol. 2613] other factors——

Mr. Coyle: Well, your Honor——

The Court: For example, let us assume for the purpose

of discussion that Los Angeles County had passed an ordinance that they would not allow more than one grocery store—assuming it is constitutional, let's not get off into any great, broad constitutional issues—assuming that they passed an ordinance that there could be only one grocery store to every five square miles. And that caused a great decrease in the number of stores in this area.

Now, don't you think that might be a relevant fact to show the decrease?

Mr. Coyle: It would show a decrease in concentration, a decrease—an increase in concentration and a decrease in the number of stores.

The Court: Yes, but the reason for it, the reason for it. What makes the thing tick? We have lost the era, I suppose, we sit down and look at television and we kind of jump to a rapid conclusion in this day and age without analyzing anything. I am trying to see what makes the Government's case tick.

Mr. Coyle: In the American Crystal Sugar case involving the sugar industry, you had exactly that situation.

The Government had legislation which would restrict [fol. 2614] new entrants into the sugar industry. And the Court of Appeals there found that this was one of the factors that made the merger more illegal and tended to establish the illegality of this—

The Court: Will you see if you can adjust this grinding instrument? Maybe we can get it in shape.

Go ahead, counsel.

Mr. Coyle: Our position is that this evidence showing a change in the makeup of the chains or the firms in the area doesn't establish anything. There was no statistics introduced to show the sales by these new entrants, no attempt made, in most cases, to establish, to show whether they had large stores, small stores.

You heard about these Pantry Markets, a lot about the Pantry Markets but not a word about whether they were big stores or small stores. The record doesn't show that.

The Court: Well, you know, it may well be that in my effort to save time in the trial of the case—I realize that some of the higher courts in particular seem to feel that the District Courts have a plethora of time. But with the cases pressing you on the back of the neck all the time,

both civil and criminal in this court, I thought I would be saving myself time by having the case presented in this fashion.

[fol. 2615] But I want to tell you something, to read this record and carry on the trial of the cases at the same time is a difficult job. I am wondering who gets punished in this situation. And it begins to appear to me that it is the judge.

Mr. Coyle: If your Honor please, I agree there are—

The Court: And I wish you would get down to those specific questions I asked you. Are you through with your statement?

Mr. Coyle: I was going to discuss some of these other matters.

The Court: Go ahead.

Mr. Coyle: Well, the second point is that the defendants have introduced evidence, there has been some evidence that some employees, officials or otherwise, have left chains and opened up stores of their own.

The Court: Not employees or otherwise, the evidence is very clear some of the top personnel have left and opened stores—

Mr. Coyle: I don't think it was top personnel, not the very top—

The Court: Suppose there were only three, counsel—

Mr. Coyle: I don't know what top personnel is.

The Court: How about a general manager, assistant [fol. 2616] manager, is that top personnel?

Mr. Coyle: If your Honor says it is, I don't know.

The Court: Well, I would assume that a manager of a store might learn something in a ten-year period if he worked for a concern like that.

Mr. Coyle: I would assume so.

The Court: He might learn something about the business, I don't know. I realize the Supreme Court apparently says that lay testimony is of no value. I can't understand how that statement was ever made.

Mr. Coyle: Well, I just don't know whether a store manager of Safeway would be classed as top personnel by Safeway. I doubt if he would.

The Court: Well, whether he is top personnel or not,

do you think a store manager would work ten years without learning something about the grocery business?

Mr. Coyle: I am sure that many of them do, and many of them have left the chains and opened up their own new stores.

The Court: Now, if he thought he was stepping out into a closed market, so to speak, don't you think he would be reluctant to leave a job and step out into something that was going to swallow him up and destroy him?

[fol. 2617] Mr. Coyle: I don't know why he would step out, your Honor. But it seems—

The Court: To make money, counsel, to make money. Economically to better himself.

Mr. Coyle: But the fact remains that some of these people that are going out of business were former employees of the chains, too. They stepped out and they couldn't make it so they closed up and went back to the chains. There is nothing in the record to indicate—

The Court: You say there is nothing in the record, then how can I consider that?

Mr. Coyle: This is one of the defendants' arguments. You don't have to—

The Court: It is not an argument at all, the evidence of record here, the evidence shows that some of these people who were in the top echelon of the chains, that is, managing, doing things of that kind, went out and opened stores and made a success of them.

Mr. Coyle: That's right.

The Court: In this area.

Mr. Coyle: That's right.

The Court: Before 1960.

Mr. Coyle: That's right, before and after.

The Court: Yes.

Mr. Coyle: But still the trend is toward the chain [fol. 2618] having a larger market share in this area and the trend is toward fewer stores.

The Court: All right. I am afraid we are coming to the point in this country where one of these days there will be a law passed that you can't make money, it will be wrong to make money.

Mr. Coyle: Well, also we have heard about the discount stores, some of these were opened before the merger and some after the merger. The defendants entered this evi-

dence as to discount stores, but they didn't introduce any dollar figures, any sales figures, any market share figures, made no attempt to establish the market shares of the discount stores, or how they have affected the grocery merchandising picture in the Los Angeles metropolitan area, other than some opinion testimony.

The Court: Well, the evidence respecting discount houses is not a conclusive form of evidence. It is merely a—it is an outcropping, such as a geologist might look at the soil to see just what the outcropping indicates. It is an indicia of something going on in an industry, that is all.

And when chain stores are competing with other chain stores and individuals are competing, and then a discount house opens up, as I understand it, a discount [fol. 2619] house is a pretty big organization. It works on the theory of volume. And I understand some of them now even say as long as you can get volume you don't need to worry about profits. Of course, this is the new theory of economics, and one of these days the law of economics will assert itself, and they will find themselves in this court in the bankruptcy section.

Mr. Coyle: That may be so, your Honor. But discount houses, as merchandisers of food and groceries are not a big factor in this market as of today.

The Court: Counsel, it isn't a question of being a big factor, it is a question of what the indications are. In other words, what the competitive—the Supreme Court talks about anti-competitive forces. Here is a competitive force that is developing right here in front of us. And apparently a strong development, because discount houses, as a general rule—as you know—are large concerns with huge floor spaces, huge parking spaces, and they draw thousands of customers each day. And they are open at night.

Mr. Coyle: Generally they don't have grocery departments in this area and—

The Court: That has been the case, I believe, up to now. But I am merely pointing out that the indication is that [fol. 2620] the discount situation is growing in this market that is supposed to be stagnant for anti-competitive forces.

Mr. Coyle: And the second consideration is a discount store is nothing more than a big shopping center under

one roof. It offers bargains. And the food departments that are going into these discount centers are generally operated by the same 20 large chains that have been increasing their market shares.

The Court: I didn't know that. Is there evidence to that effect in the record?

Mr. Coyle: Of course, Mr. Von der Ahe—yes, your Honor, Mr. Von der Ahe testified that the discount store is merely another type of shopping center, the grocery department—

The Court: That isn't what I am talking about. You are saying that the discount houses are operated by the chains.

Mr. Coyle: By the chains, yes, there is evidence in the record that all but five of the complete discount food operations in the metropolitan area, as of the time of trial, were operated by firms which were also operating supermarkets in shopping centers in some other location.

The Court: Well, I don't think that is inconsistent—I think that is a bit inconsistent with the statement—you [fol. 2621] gave me the impression that the chains were operating in the discount houses.

Mr. Coyle: Many of them are the 20 largest chains. I don't think there is evidence to show what percentage of these operations are chain—

Mr. Vaughn: There is precise evidence, your Honor, as to exactly who operates each grocery department in each discount house. And there are some that are operated by, or are adjuncts to large chains, and some are not.

The Court: I understood that, I understood that.

Mr. Coyle: I think many, your Honor, Lucky Stores operate many of them.

Mr. Vaughn: "Many" is not—

The Court: What is "many"? I don't know, I don't understand.

Mr. Coyle: Well, there are not too many all together.

The Court: Is "many" three or 55?

Mr. Coyle: I would say 7 out of 37, but that is a guess.

And then we have the fact that three large eastern chains have acquired large local chains. Two of these acquisitions are under investigation right now.

The Court: Well, I assume that the law still is in [fol. 2622] America until something is done, I must treat

it as a fact existing, until some court rules it is illegal I can't jump to the conclusion it is illegal, can I?

Mr. Coyle: I agree. I don't see how these additional acquisitions in any way offer a defense to these people in this case.

The Court: Maybe it might prove the necessity of fortification on the home front to repel the invader.

Mr. Coyle: Von's and Shopping Bag, it was stipulated, they were able to compete effectively against Safeway prior to the acquisition. And Safeway is larger than any of these firms.

The Court: But Safeway, did you know it, closed quite a number of stores in Long Island, through New York, they were losing a fortune.

Mr. Coyle: They got out of Long Island.

The Court: Yes. Why? Why? Did they close it because of the anti-competitive forces?

Mr. Coyle: I think it was just too far away from the rest of their operations.

The Court: They just didn't get enough business to make ends meet, that is what I understand, from the Wall Street Journal.

Mr. Coyle: Somebody else was operating those stores all right. They sold them out, your Honor.

[fol. 2623] The Court: You know, sometimes stockholders have an effect on companies, too, counsel. If you don't get any dividends for a few years you might have some complaints, why carry on this business if you can't make money? Maybe Safeway got some of those complaints.

Mr. Coyle: And then you have the opinion testimony, the opinion of these retailers that this merger will lessen competition, it won't lessen competition—

The Court: That on the whole is just a conclusion.

Mr. Coyle: Yes, your Honor.

The Court: I suppose I know as much about it as they do.

Mr. Coyle: About the legal issues involved, I hope you do, your Honor.

The Court: I hope so. And I might even know as much about the grocery business as some of them know, from the way their testimony is. At least I have had the experience of working in a grocery store—and in a hardware store and in a lot of types of stores. And I realize that

experience today is marked in the lower grades, but experience is still of some value.

And experience in this area, as a trier of the facts, I don't think a jury has to put blinkers on to try a case factually. And I don't think a judge ought to have to, [fol. 2624] either. So I am assuming that I don't have to put blinkers on, what I have seen around me for the last 35 years here I just can't completely disregard, can I?

Mr. Coyle: I don't know, your Honor.

The Court: You say you don't know?

Mr. Coyle: I don't know what you have seen, your Honor.

The Court: What is it? I mean, do I have to disregard the obvious facts in this area, as a trier of the facts?

What is the law? You are the chief counsel for the Government, tell me what the law is. I am willing to be educated.

Mr. Coyle: Well, I think that the record sets forth the obvious facts in this case, your Honor.

The Court: Well, that is a State Department answer. So take up the next matter.

Mr. Coyle: I think your first point that you mentioned, your Honor, what is the decline in the number of stores between 1950 and 1960, I am not too sure what your Honor wants—

The Court: I was trying to find out, counsel, whether or not I was foreclosed of the public knowledge of this relevant trade area. If a person, a trier of facts on a jury, were to be compelled to exclude all of his knowledge, [fol. 2625] edge, he probably could not serve on a jury.

Mr. Coyle: If people who sat on juries were grocery men, your Honor—

The Court: Well, that is a little different situation. It may well be it is perfectly proper.

Mr. Coyle: Yes.

The Court: But I am talking about this court is in this position: I have lived in this community, practiced law here for about 35 years. And I have seen some of the things that go on in this community. And one who is trained from childhood to observe, keep his ears open and his eyes open, and see and hear, has to see and hear some of the things that have happened.

Now, I am wondering if I have to completely disregard some of the obvious happenings in this community in the grocery business, in the real estate business—in other words, the economic upsurge in the community, the change in patterns.

For example, the city used to bring people downtown in streetcars. Many of them would shop on Broadway at a large grocery store, or they would shop on Hill Street, or Main Street.

But all of a sudden markets started to go out to the building communities, isn't that right?

Mr. Coyle: Yes, your Honor.

[fol. 2626] The Court: And, of course, they have built in the crowded communities as well. But each time a new community goes up there is a race to put in markets. And there is a race by the real estate operator to get the big markets to come in and take the leases because they can get a lease with a corporation that has an A rating financially, and they can get a 25 or 30-year lease.

So it is those things that I am talking about. Am I to disregard those things entirely in this case?

Mr. Coyle: No, your Honor. But I don't think that the decision in this case will turn on those things.

The Court: Well, let's say then that you admit they are admissible, but you say they have no weight.

Mr. Coyle: That's right, that is a good answer.

The Court: All right.

Mr. Coyle: Now, you have referred to this statement on page—I don't know what page it is—but largely the reduction in the number of stores in the area has resulted from the increase in the dollar sales of stores, or something like that—

The Court: "Largely from the increasing size of supermarkets and the large continually expanding dollar sales." That is an exact quote.

Mr. Coyle: Certainly I don't know whether we put [fol. 2627] the horse before the cart, but the two things seem to go hand in glove, as you have a decline in number of stores you are going to have an increase in size of the stores, and an increase in the dollar sales of the stores.

The Court: Well, I think that is—

Mr. Coyle: I mean it is obvious people are eating as much food, or more food than they ever did.

The Court: I think they are probably eating more. But you have overlooked the fact that prices—for example, in 1932 in Los Angeles you could buy a good ground round steak for ten cents a pound. Today you can buy it for—what, I don't know.

Mr. Coyle: I haven't bought any steak.

The Court: Well, I will tell you one thing, it is far above ten cents a pound. So the increase in dollar sales has been largely—a good part, not largely—but in a good part to the decrease in the value of the good American dollar which has gradually been destroyed, being destroyed.

Mr. Coyle: I think that the pertinence of this fact, and the fact that the total number of stores have declined in the area, regardless of whether it is because of the mobility of people, the fact that people have moved out into communities, regardless of that, when you put the things [fol. 2628] together, the decrease in the number of stores in the area and the increase in the market share of the 20 largest chains of the area, when you put those two things together you do have a definite pattern in this area where you have fewer firms accounting for an increasing percentage of the total grocery and related products sales.

The Court: What was the share, do you know, or does the record show what was the share of Safeway and Ralphs, and the ten—how many leading chains did we have in, say, 1940? We don't have that in the record, do we?

Mr. Coyle: I think the record doesn't go beyond 1950, your Honor, 1948. Our first record goes back to 1948, I think, and the defendants' does, too.

There was some testimony that Safeway had a big share back in 1920.

The Court: I think Safeway had how much, how many stores was it, a thousand stores?

Mr. Coyle: A thousand stores. I don't think there is any evidence as to what market share that represents.

Mr. Alsup: There is evidence in the affidavit of Charles Von der Ahe and also of Theodore Von der Ahe that Safeway in 1930—it was 1930 when Safeway was put together, [fol. 2629] your Honor—and the great bulk of the grocery stores sales in this area, and many people were afraid they

would have a monopoly. As a matter of fact, their number of stores and their percentage of the market steadily declined.

Mr. Coyle: Your Honor, that "great bulk" doesn't tell us—

Mr. Alsup: No, we do not have the exact—

The Court: We don't know what market share they had. As a matter of fact, it would be a good guess that they had a far greater market share dollar-wise, percentage-wise—not dollars—percentage-wise than they have today.

Mr. Coyle: Well, their market share went down between 1948 and 1958.

The Court: I can remember the time when there was a Safeway in about every neighborhood in this city, about every car stop there was a small Safeway store.

Mr. Coyle: But other than Safeway, I think all the other chains, with the possible exception of Ralphs, which has held about even since 1948, all the other chains have gone up. Your Honor mentioned the decline—

The Court: How about Piggly-Wiggly? What happened to it? Did it go up?

Mr. Coyle: We don't have any figures on Piggly-Wiggly. [fol. 2630] The Court: They started out with a big flourish here at one time.

Mr. Coyle: I know about Piggly-Wiggly, but Piggly-Wiggly—they did go out of business.

The Court: I don't assume they went out of business because they made too much money.

Mr. Coyle: I don't know when it was even. It is possible that—

The Court: They are back in business again, aren't they? Piggly-Wiggly, I believe the record so shows.

Mr. Coyle: The name is back, I think the name is back.

The Court: Yes. I believe Piggly-Wiggly was the first self-help store, wasn't it?

Mr. Coyle: I believe so, your Honor.

The Court: Clarence Saunders of Memphis, Tennessee, I believe was the founder. And I think the courts took his name away from him, wouldn't let him use his own name in the grocery business because he was associated with Piggly-Wiggly. I think he was the founder of that system, if I remember correctly.

But they are in business, I believe, according to the record, back in business again after having gone out into bankruptcy.

[fol. 2631] Mr. Coyle: There is something in the record about Piggly-Wiggly, I am not sure just what it is, whether it is the same Piggly-Wiggly, or whether it is a Piggly-Wiggly franchise now.

The Court: Probably, but, counsel, the thing is, apparently one of the things which concern me, obviously from this record there were a number of concerns that went into the grocery business that didn't know a piece of side pork from a lawnmower. And they went broke. Fox Markets is an example.

Mr. Coyle: They got into trouble and sold out to Food Fair.

The Court: Yes, that is just one of them. But there must have been a number of concerns that were opened during this flush period during the war particularly; for example, from 1941 to 1946, if you could have opened up a liquor store and sold liquor you would have had to have a police guard there to keep people away from your place if you could have sold just plain ordinary Scotch and ordinary bourbon.

Mr. Coyle: That happens in the—

The Court: In the grocery business it happened. Now after the war, despite the increase in population there must have been many of those people that had to go out of business.

[fol. 2632] Mr. Coyle: That happened in the shoe industry, your Honor. That happens in most of these industries.

The Court: In the automobile industry it happened.

Mr. Coyle: And certainly we have increasing concentration in the automobile industry. And that is one of the things that cause the increase in concentration.

But when you have increase in concentration, then you have two of these strong chains, two of these strong firms in that market where you have an increase in concentration, and those two strong firms merge, that certainly makes the merger of the firms more significant than it would be if you did not have this increased concentration.

The Court: Well, it is too bad we can't have regulated

monopolies. But I don't know who would regulate it. If the Government regulated it, then it would be a monopoly on top of monopoly.

So we will take a recess for about fifteen minutes.

(Short recess.)

[fol. 2633] The Court: All right. Let's proceed.

Mr. Coyle: Your Honor has been discussing or we have been discussing a fact that there have been changes in the make-up of the market here, firms have gone out of business, firms have come into business; that there have been developments in the form of shopping centers, discount stores, all of these factors. But regardless of all that, you still have this pattern of increasing market shares of these leading chains. We were referring to this Defendants' Exhibit AN, I think it was, that shows the market share of the three leading chains in the area. That includes Safeway that had the decline over the years. In 1950, which is the first year that defendants cover, I think, on this exhibit—in 1950 the three leading chains had 21.4 per cent, in 1960—and we don't accept their 1959 or 1960 figures, because there was a strike in '59, and in 1960 they only had partial figures, and they made a lot of estimates, or their economists made a lot of estimates. We don't accept those figures, but the exhibit shows in 1950 the three leading chains had 21.4 per cent. In 1960, after the merger, the three leading chains had 21.5 per cent. In 1958 the three leading chains had 19 per cent. So there was a decline largely due to Safeway's losing its market share between 1950 and 1958 of 2.4 per cent in the market share of the three leading chains.

Then you come up to the four leading chains, and [fol. 2634] the Safeway decline carried over, so in 1950 the four leading chains had 24.2 per cent, and by 1958 they had 23.4 per cent. So you had a decline of about .8 per cent.

Then you get up to the five leading chains, and you find in the defendants' exhibit that the five leading chains in 1950 had 26.7 per cent; in 1958 they had 27.8 per cent. So the five leading chains—among the five leading chains the gains of the four other than Safeway offset Safeway's declining market share, so the five leading chains had 27.8 per cent.

Then you get up to the eight leading chains, and you find that they went from 32 per cent, 32.6 per cent in 1950 to 39 per cent in 1958.

Nine leading chains went from 33.6 per cent in 1950 to 41.7 per cent in 1958.

So the record is clear on the defendants' own exhibit as to that increase in the market share of the leading chains in the area.

Now, we have talked about the number of stores operated by the chains and we find that in 1948 on the defendants' exhibit Safeway Stores are not shown. In 1954 Safeway had 185 stores; in 1958 they had 154; in 1960 they had 140. But all the other chains in the area, Von's in 1948 had 14, in 1954 they had 16—

The Court: Counsel, are you overlooking the fact that [fol. 2635] the population has been growing by leaps and bounds in this area?

Mr. Coyle: No, your Honor. The population has been growing by leaps and bounds, the number of stores has been declining, but the number of stores operated by the chains has been increasing.

The Court: So a fortiori it is illegal?

Mr. Coyle: A fortiori you have increased concentration when you consider the increasing market share of the chains.

Then we have two of these leading chains in this market where you have increasing concentration—two of these leading chains have merged and added to this increasing concentration.

The Court: I was interested in your remark yesterday that we would be better off if we had just individual stores.

Mr. Coyle: I didn't say that, your Honor.

The Court: I understood you to.

Mr. Coyle: No. I said that a premise of the Act as stated in the Philadelphia case was that competition is likely to be more vigorous if you had many entities, many separate entities, instead of a few large entities in a business.

As I understand the Act, the Act carrying out this [fol. 2636] concept prohibits mergers which are going to result in a large number or a significant share of the total market falling under the control of one corporation.

The Court: The Act doesn't say that.

Mr. Coyle: The Act as interpreted by the courts and the Congressional Reports say that.

The Court: I think there has come a time—they will be anyway—every one of these cases will have to be decided by the Supreme Court. I wish Congress would pass a law and give them original jurisdiction in these matters. It would save us the trouble of deciding them and being reversed. About every case that goes up, if a District Court decides it, they reverse it anyway. It would be really better if Congress gave them original jurisdiction.

May I see that exhibit, please? I assume it is proper and appropriate for a lower court to mention the higher court in a way, with respect, but still with critical respect, but it is getting to where a District Court doesn't know what to do. We have come to the myth in America that all the learnedness is in the higher courts.

I am happy to say that Judge Frank, who was on the Second Circuit, once said—I am sure it doesn't apply to this court—that it takes more knowledge to be a District Judge than it does to be on the appellate court.

I wonder if he is right.

[fol. 2637] On this exhibit the increase in the 20 chains has been from 40 per cent to 53 per cent.

Mr. Coyle: Is that 1960, your Honor?

The Court: Yes.

Mr. Coyle: There was that strike in 1959—

The Court: Yet the chains you have listed in your memorandum on page 4 only account for 43.6 per cent.

Mr. Coyle: That is 10 of the 20.

The Court: Yes, I understand. But the number of stores, for example—let me ask you a question. How many stores does Market Basket have?

Mr. Coyle: I couldn't answer unless I looked at the exhibit, your Honor.

The Court: I can't, either, without looking.

Mr. Coyle: You have the exhibit.

Mr. Vaughn: 55, your Honor.

The Court: Is it in this exhibit here?

Mr. Coyle: Yes, your Honor.

The Court: I see. Yes. I thought it was on the other exhibit. Let's see the stores, the number of stores. I see

we have Alexander Markets. I thought I had seen this mentioned, three stores. That is a terrific chain.

Mr. Coyle: I am not sure that they are on our top 20, your Honor. That's the defendants' top 20.

[fol. 2638] The Court: Who are your top 20? I would like to know?

Mr. Coyle: May I see the exhibit, your Honor? This is a defendants' exhibit.

The Court: All right. I will let you see it. But there we go again, we talk about big chains, and there is one with three markets.

Mr. Vaughn: Your Honor, that was in 1948, of course. In 1960, according to that exhibit, Alexander's had nine stores.

The Court: I am coming to that. So it has developed into a huge chain of nine stores.

This is why I say, when you use the word "chain," it is like the words today where we are using so many words, talk about rights and privileges. We have lost the art of being specific.

How about—we take the number of stores for Safeway, they now have 154; at least in 1958. Von's we will skip. Ralphs Grocery has 34. I wonder if this is less than Ralphs Grocery had at one time.

Mr. Coyle: It may be, your Honor, but the exhibit does not show that.

The Court: Does the evidence show?

Mr. Coyle: I don't think so, your Honor.

The Court: I have a feeling that it is fewer stores [fol. 2639] than they had at one time.

Mr. Alsop: I have no doubt that it is substantially fewer, but we do not have specific evidence on that.

At the time of the organization of Certified in 1924, Ralphs and Safeway, and one other store I can't recall, were about the only—McMarr's and Humpty-Dumpty—direct buying chains, they were large enough to buy direct from the manufacturer.

The Court: That's what makes it so difficult. Here is a good chance to use the word—what is it, fragmented?

Mr. Coyle: Yes, your Honor.

The Court: It is fragmented, believe me, the evidence. So Ralphs here, we have no showing at all in the record.

of how many stores they have decreased. I assume it is quite a number.

Food Giant has 18 stores. Wait a minute. Maybe I am reading this wrong. I will have to get a piece of paper across it.

Market Basket, 39 stores. Food Giant, 18. Fox Markets—which has now been purchased by whom?

Mr. Coyle: Food Fair, your Honor.

Mr. Alsup: They were first organized after 1948, your Honor. I think about 1954.

[fol. 2640] The Court: The Alpha Beta Food Markets, does the evidence show when they came into this area? It is a recent date, I am sure.

Mr. Coyle: They were acquired recently, in 1961, I think.

The Court: Acquired. But they were here before they were acquired?

Mr. Coyle: Yes. I don't know how long they were here.

The Court: It is a more recent date, isn't it? Does the evidence show how recent?

Mr. Coyle: I don't think so, your Honor.

Mr. Alsup: We have the affidavit of Claude Edwards that we offered in evidence without objection, who describes the history of Alpha Beta. Alpha Beta has been here, I think, since the early thirties. About 1930, didn't he say, it was organized?

Mr. Vaughn: I think that's correct.

The Court: It may have been organized, but it wasn't—

Mr. Alsup: It was very small.

The Court: It was very small.

Mr. Coyle: I don't recollect any evidence showing it.

The Court: I don't think there was any evidence.

[fol. 2641] The Lucky Stores, 7. Hughes Markets, there are about 8 markets. Shoppers Markets, 10. Greater All American Markets, 16. Alexander's Markets, 9. The Great Atlantic & Pacific, 14. McCoy's Markets, 12. And Yor-Way Markets, 15.

I realize the dollar volume is important in these things, but also the number of stores is important. I can't believe that all these stores running 6, 7, 8, 9, 10, 11, and even 15 stores, have any great lock on this market.

Mr. Coyle: We know the top 20 chains—and the parties agree to this, I think—the top 20 chains in the area in 1958 were operating 598 stores. Under our statistics, they accounted for 56.9 per cent of all grocery sales. So you have——

The Court: You say the 20 chains. But the top 10, the really large organizations, account for 43 per cent?

Mr. Coyle: 43 per cent. Which is a significant concentration.

The Court: The word "significant" is a word I don't understand, except in a poetic sense.

Mr. Coyle: They accounted for a lot more in '58 than they did in '48, that's certain.

The Court: In other words, when something becomes significant, then it becomes proscribed by the Act?

Mr. Coyle: No, your Honor.

[fol. 2642] The Court: I am trying to find in this case where there has been a reduction or the strong possibility, or even a possibility of a subsidence of this competition as it has existed in this area.

You see, the thing that bothers me is that this area has been in a changing process ever since it has begun to grow, about 1920, I guess, 1915. The grocery business has gone through many changes; the types of stores, the way to get to the stores, the transportation facilities. You watch, counsel, if you are here, there will be a big change, if this city ever grows up, becomes big enough and responsible enough to have a rapid transit, you will see another big change.

So we have gone through in the last 35, 40 years here, several changes in the grocery business. It seems to me it is difficult to just say that because the stores are fewer, that that in itself leads to the conclusion that the competitive situation has become what Congress has inhibited or proscribed. That's the problem.

Mr. Coyle: It is not just the reduction in the number of stores; it is the reduction in the number of stores, plus the growth of the chains and the increased market share of the chains, and the history of mergers, that have resulted in the growth of these chains. You have those three factors. All of them tend to prove, or combined do

[fol. 2643] prove the increasing concentration which Congress meant to halt if it resulted from mergers.

The Court: Congress certainly didn't intend to stop the big store, did they?

Mr. Coyle: No. They wanted the big store to grow by natural growth, instead—

The Court: Do you know what the relative volume would be between the stores, say, of Safeway, that used to exist, and one of the so-called large markets today?

Mr. Coyle: It would be substantial. The difference would be substantial. I don't want to use the word "substantial" but it would be a great difference.

The Court: I would make a wild guess and say that the average Safeway store would have been lucky to do—this is a pure speculative guess, I would just make a wild guess—let's say a couple of hundred thousand a year at the top.

Mr. Coyle: In what year, your Honor?

The Court: Back in the years when they had the small stores. I doubt if they would have run that high.

Mr. Coyle: Groceries were cheaper then, too.

I would say Safeway, we do have some figures, but I would say that Safeway averages slightly less than two million, I think, in their stores today.

The Court: The square footage has increased considerably, and the number of items sold.

[fol. 2644] The grocery business, like the drug business, is moving into other areas. I wouldn't be a bit surprised to see them selling automobiles in grocery stores one of these days.

We already have that coming up in the General Motors case, the selling of automobiles in the discount houses.

You may not know it, but the drug stores put a lot of hardware stores out of business. Did you know that?

Mr. Coyle: No, your Honor.

The Court: These are things that people learn as they pass by the trees and see them. If you sell alarm clocks and screwdrivers, and locks and files, and everything under the sun that the little merchant and the hardware concern sells, he soon can't compete against the drug store.

I daresay if you go into the average drug store, you

would be surprised how much hardware you can find. Haven't you noticed it?

Mr. Coyle: Not particularly.

The Court: So I assume the government would say, because a lot of these little hardware concerns have gone out of business, that the big hardware concerns put them out of business. But that isn't necessarily true. The grocery store, the dry goods store, all of the stores now—you see, at one time in America we had the general store. We are moving back toward the general store in many areas today, [fol. 2645] the discount house. They are selling everything.

I don't know whether they have prescription drugs yet or not, but I assume that will go in soon. They are putting in groceries, everything from carpets to furniture. It may be that they are moving back toward the general store again. I don't know. These are things that people who are not familiar with industry—and I certainly am not, I am a little better familiar than some of the courts, I think—that just don't know what goes on.

When we get to these generalities and don't probe beneath the surface, we don't reach the crux of the problem, in my opinion.

I here am wondering how you would answer this question. Would the combination of Von's and Shopping Bag not increase its ability to compete against these other big chains?

Mr. Coyle: Von's and Shopping Bag were both able to compete against the other large chains prior to the acquisition. They had grown in competition with Safeway. A. & P. has been in here. They were growing and were operating successfully in competition with both A. & P. and Safeway.

The Court: That's true, I think. But when they combine now into the present number of stores, has it increased or decreased their competitive situation?

Mr. Coyle: It has given them competitive advantages. [fol. 2646] The Court: What are they? I would like to know.

Mr. Coyle: The advantages of better buying—

The Court: You keep saying "better buying." In what way?

Mr. Coyle: Buying in larger quantities.

The Court: Is there any evidence to show what that better buying is?

Mr. Coyle: There is testimony to the effect that as your volume of buying gets larger, you get better prices on meat and produce and you are better able to secure advantages in buying meat and produce.

The Court: Well, I thought the testimony was that there was a limit, a point where you reach a limit.

Mr. Coyle: I believe there is conflicting testimony in that regard.

The Court: I think there probably is. One of the items, for example, that put Safeway back in the public mind was its meats. Did you know that?

Mr. Coyle: Yes, your Honor.

The Court: They had a man who worked for Safeway, as I understand, who found out that the meat that he bought from his own store wasn't so good, so he went out and saw to it that Safeway got good meat, and today Safeway still has the reputation for having good meats. [fol. 2647] Many people go to Safeway because of the meats.

Now, I am wondering if Safeway is able to go out and buy meat much cheaper because of buying in volume.

There is no evidence in the record that that is so.

Mr. Coyle: The only evidence is that Von's and Shopping Bag were able to compete against Safeway prior to the acquisition, and to grow in competition with Safeway.

The Court: Some of these single stores have been able to compete, apparently.

Mr. Coyle: Some have and some haven't. Some testified that they are under great handicaps in competing against Safeway and the other chains. Others testified that they are not under handicaps in competing.

The Court: What is the problem, then? If a person feels—on groceries, certainly he can go to Certified, or join Orange Empire, go to those and get the same prices that everyone else gets, can't he?

Mr. Coyle: He can get a discount price on the items that Certified or Orange Empire handle, which does not include meat or produce.

The Court: I understand it doesn't include meat or produce. But you know if a grocer wants to send some-

body down to this market early in the morning down here he can compete with anybody else.

[fol. 2648] Mr. Coyle: There is conflicting testimony on that, too. Many of the retailers said that they couldn't do as well by going down to the wholesale area or the market area and buying early in the morning, but some of these larger purchasers could, because they could go in and buy up larger quantities, and quantities do enter into the price.

The Court: You mean by having direct delivery? There is no evidence to that effect.

Mr. Coyle: What?

The Court: On vegetables or produce.

Mr. Coyle: There is evidence, there is testimony to the effect that chains do have an advantage in buying.

The Court: The word "advantage" is a conclusion. What is the evidence?

Mr. Coyle: They can buy cheaper.

The Court: Is any particular product mentioned at all?

Mr. Coyle: Produce. Produce and meats.

The Court: I see. That's the trouble, there are too many generalizations.

Take, for example, papaya, I suppose, for example, any store in town, even a single store, can buy papaya as cheap, or grapefruit, California or Arizona grapefruit, or the vegetables that come from the Valley, strawberries, or carrots, or those things—

[fol. 2649] Mr. Coyle: Again, there was conflicting testimony, but there was testimony as to specific types of vegetables. I don't have the citations to it.

The Court: Does the record show that the vegetables sold in the chain stores are cheaper than those sold in the single stores? I don't believe it does.

Mr. Coyle: I think there is some testimony on both sides of that issue, your Honor.

The Court: Well, go ahead, counsel. I have interrupted you. I interrupt you to try to learn. It is not to heckle you but to try to learn. I am trying to find out on what you predicate your case.

How much more time would you like?

Mr. Coyle: As much time as your Honor wants me to answer questions.

The Court: Counsel, I am here to listen and to discuss with you, and I want to give you ample time. If you want additional time this afternoon—we will conclude this this afternoon. We will conclude it this afternoon. I will be glad to hear you further.

Mr. Coyle: I think there are some of these questions—

The Court: That's what I thought. How much would you anticipate? Another hour?

Mr. Coyle: Another hour to answer you.

[fol. 2650] The Court: May I inquire of defense counsel approximately how much time you would desire? I have other matters pressing me.

Mr. Alsup: I think it would depend on the questions your Honor has to ask. Thus far, frankly, I haven't seen much to answer.

The Court: Don't get presumptuous.

Mr. Alsup: Obviously not, your Honor. I am prepared to answer anything, your Honor.

The Court: I don't mean that in the wrong way. But now sometimes lawyers get their hat and their brief case and leave too soon. I haven't made up my mind in this case. Many of my questions are put in a fashion to try to stimulate answers. It doesn't necessarily mean that that's my opinion.

Mr. Alsup: We have comments on the questions which your Honor has put to government counsel.

The Court: It is like Meet The Press. I ask questions to bring out the points. They don't necessarily reflect my attitude sometimes. I find that you almost have to gig some lawyers to get them around to answer what you want to learn about the case.

Mr. Alsup: We feel this type of question and answer session is very helpful.

The Court: It is sort of an arbitration, but more of a Socratic form.

[fol. 2651] Mr. Alsup: It is helpful to know what the court is thinking and discussing.

The Court: Usually, nowadays, if you go into a discussion, at least socially, they say, "Get off of that and let's get to something else. Where is your bartender?"

We will recess to 2:00 o'clock, and we will complete

this by I hope 4:00 this afternoon, or earlier, if possible.

Mr. Coyle: Fine, your Honor.

The Court: I want to leave one thought with you, Mr. Coyle. That I, at the present time, am of the opinion that I may consider evidence relating to the industry after the filing of the Complaint, up until the date of my decision. I think it is a question of weight, rather than a question of relevancy. I think it is relevant to reflect upon the contemplation of whether or not there was a probability of substantial decrease in competition. In other words, just as the Supreme Court in the Dupont case put in its notes up to 1955. Then I noticed at the very beginning of the discussion it says—I thought I remembered them saying something about 1955. Just one moment.

Yes, it starts on page 596. The court says:

[fol. 2652] "In 1955 General Motors ranked first in sales and second in assets among all United States industrial corporations, and became the first corporation to earn over a billion dollars in annual net income."

Then it cites a note 18. New York Times, February 3, 1956.

Well, if the Supreme Court can consider things of that fashion, it seems to me that perhaps the lower court can, too. So I am considering this evidence to reflect upon whether or not there was a probability of a substantial lessening of competition.

Mr. Coyle: I can well appreciate your Honor's position. The only problem that I see with this is that you do get into this position where one might get into the position where the government has to more or less show an actual lessening of competition between—

The Court: No, I don't think that is required at all. For example, let's assume, just assume, that after 1960 the government would have been able to show that Safeway had jumped to 80 percent of all dollar sales in the Los Angeles area, do you mean to tell me that you wouldn't have offered that in evidence?

Mr. Coyle: We wouldn't have been able to show it. I don't know what we would have done. I think the gov-

ernment can go beyond its burden. But to permit the [fol. 2653] defendants to go beyond the government's burden, then you get to a point where they are trying to rebut something we didn't attempt to prove.

The Court: Counsel, you do at times make answers that do sound a little bit like the State Department. That answer doesn't give me any information to speak of at all.

What I am asking you is, wouldn't you have, if you had been prosecuting this case, introduced into evidence, if the court had allowed you, the fact that by 1964, say January 31st, say up to the date of the trial—let's forget after the trial—that it suddenly developed that several of these companies had faded out, gone, and Safeway was left with 85 per cent or 80 per cent of all dollar sales—do you mean to tell me you wouldn't have tried to put that in evidence?

Mr. Coyle: If I put that into evidence I would be assuming a burden that I wouldn't have to meet.

The Court: That isn't what I asked you, what you would be assuming. Wouldn't you have tried to put that in evidence?

Mr. Coyle: I might have, your Honor.

The Court: The probability would be that you would have.

We will stand recessed.

(Whereupon at 12:00 o'clock noon a recess was taken until 2:00 o'clock p.m. of the same day.)

[fol. 2654] LOS ANGELES, CALIFORNIA, TUESDAY, MARCH
24, 1964; 2:10 P.M.

The Court: All right, Mr. Coyle.

Mr. Coyle: If your Honor please, I have gone through this list of questions that you asked and have found only a few that we didn't touch on this morning, and I will go through those as quickly as I can.

The Court: Very well.

Mr. Coyle: The court mentioned that the government presented 18 witnesses who entered the business since

1948. My observation on that is that during the same period many more left the industry than those who entered. Also, many or a number of these entrances by the 18 witnesses amounted to one of the witnesses taking over an existing store, it was not a complete entrance as if he opened up a new store, he just took over an existing store, and somebody else left the business at the same time.

Also, some of these chain store officials who have been referred to as men who entered the business as private businessmen, actually took over an existing store and somebody left the business at the same time as they entered the business.

The Court: I think that's probably true. I think the evidence indicates in some cases that was true. As a matter of fact, I think, if I remember correctly, in one [fol. 2655] instance they took over a place that wasn't doing so well, and it turned out it did very well.

Mr. Coyle: Yes, the chain sponsored them to go in there and gave them financing, and so forth.

The Court: I don't remember that.

Mr. Coyle: One of them did. I don't know which of these witnesses—

The Court: I didn't remember the financing part.

Mr. Coyle: I think one of them did, yes.

The Court: I see.

Mr. Coyle: Now, there is no question that single stores have a harder time getting into the shopping centers than chains.

The Court: No question at all. That just follows as day follows the night. If a man has enough credit and can make a lease—let's assume that you want to open a store in a new shopping center; now, first of all, what draw do you have to sell other tenants? Wouldn't you think it would be better to have a Kresge or one of the Five and Tens? Or let's think of some of the other stores that are well known throughout the country. When you go—let's face the facts. When a shopping center is put up, it is put up by a person who is promoting that shopping center. He goes out and buys the land, and then he goes and usually often gets the government or someone to [fol. 2656] finance him, and he builds a shopping center.

Now the first thing he wants to do is to make it desirable for tenants to move in there and take a long-term lease. Isn't that right?

Mr. Coyle: That is correct, your Honor.

The Court: Would he rather have Mr. Coyle or Judge Carr in there, who is not known at all in the grocery business, or would he rather have Von's or Safeway or somebody who has a name, and who, furthermore, has pretty good financial standing? I think this is just an economic fact that you can't avoid. So what happens? They go around and say, "We have one place left out here, we have got Safeway, Kresge, we have this, we have that, we have the Bank of America, so we have got a great shopping center."

Mr. Coyle: That's correct, your Honor.

The Court: So I think it is conceded that the claims have a better opportunity to get into the new shopping centers than, generally speaking, the individual would have.

Mr. Coyle: That is correct, your Honor.

Then Von's and Shopping Bag prior to the merger both had the financial stability to get into a shopping center, they both had the trade names, and the consumer acceptance in the area, which is one of the things—

The Court: I don't know that there is any evidence on that score. Is there?

[fol. 2657] Mr. Coyle: I think there is, yes, as to the consumer acceptance.

The Court: May I interrupt a moment?

Mr. Alsup: There was evidence that prior to the merger both Von's and Shopping Bag were able to and did get into shopping centers, yes.

The Court: Yes, I believe I remember that. That was by Mr. Von der Ahe?

Mr. Alsup: Mr. Von der Ahe and Mr. Hayden.

The Court: Yes, I do recall it now.

Mr. Coyle: Various of the industry witnesses mentioned that, too.

The Court: I don't think it would be subject to doubt, anyway. They would certainly be able to get in. Although I can say this, that it may well be that someone might prefer some other chain.

Mr. Coyle: That is correct, your Honor, It might also be that someone might prefer a chain with a trade name or a reputation whom that particular tenant felt was more desirable.

The Court: I think the building promoter likes the stability of the 25 or 30-year lease, where he can get, as they call it, net business, net-net-net, and not bother about anything, be sure it will be paid every year come high water or else.

[fol. 2658] Mr. Coyle: That's right. I think it is also true, as we stated in one of our briefs, that the combined Von's and Shopping Bag will even have more financial resources, and even have more——

The Court: I think that follows, too.

Mr. Coyle: They would have even a better opportunity to get in.

The Court: I think you are right about that.

Mr. Coyle: Now, the court asked why did the president of Certified testify that he doesn't anticipate any lessening of competition——

The Court: Not why he testified. I didn't ask you why he testified. I asked you how you meet that?

Mr. Coyle: I meet it just like I meet all this other testimony as to a legal issue. He is not competent to testify as to legal issues.

The Court: He isn't testifying to a legal issue. He is testifying to the fact that people can purchase, if they want to purchase groceries, they can join his organization——

Mr. Coyle: I didn't understand that question, then.

The Court: I am talking now about the anti-competitive features. In other words, suppose I open up a store out here and put in it—which would be an awfully [fol. 2659] big inventory—say a hundred thousand dollar inventory, I imagine that would be a pretty substantial inventory, and I wanted then to buy my groceries from Certified, I could do so by joining up with them, couldn't I?

Mr. Coyle: If you were a member of Certified.

The Court: All I have to do is to join up.

Mr. Coyle: You have to deposit money. And I suppose the Board has to approve your joining.

The Court: I assume so. But I don't think there would

be any problem about it if you make the deposit and apply. They want the business.

As a matter of fact, I think at one time Certified would sell to other than members during this period, wouldn't they?

Mr. Coyle: It might be. I don't know, your Honor.

The Court: One of them did at one time sell to other than members. Was that Orange Empire?

Mr. Alsup: Yes.

Mr. Coyle: One of them had a cash and carry business.

Mr. Vaughn: Orange Empire had and still does have a cash and carry.

The Court: There is no evidence in this record that there is any discrimination in price between the members, the people who purchase from Orange Empire, there [fol. 2660] is no discrimination as to price, there is no evidence, is there?

Mr. Vaughn: There is no evidence and I know of no information.

Mr. Coyle: I know of no evidence either way.

The Court: What I am getting at is the freeness of the market.

Mr. Coyle: Orange Empire—this may be a side issue—Orange Empire, I think, also is a wholesale grocer, or A. M. Lewis is also a wholesale grocer. I think there may be evidence in the record, or it may be a fact, that the members purchase as members and they get a rebate on their purchases, and non-members do not.

The Court: I don't know whether it is a rebate or not, but I imagine they may get a slight discount.

Mr. Coyle: I think it may be in terms of a premium at the end of the year. I am not sure.

The Court: There is a big difference between a rebate and a discount. One of them might be legal and the other might be illegal.

Mr. Coyle: I was thinking of a premium on the products.

The Court: That's what I understand, they might as participants participate in some way, as the Automobile Club, you don't get the profits in cash, but you get a [fol. 2661] reduction in your policy of a certain amount by driving in this traffic here without an accident for a few years, which is remarkable if you do it.

Mr. Coyle: Getting to the discount, your Honor, and the cooperatives—

The Court: Counsel, what I am getting at—pardon the interruption—what I am inquiring to find out is how unfree, to put it ungrammatically, is this market or was this market at the time we are talking about, during the pendency of this suit? How unfree was the grocery market? What restraints were there?

I am not talking about anti-Sherman or Sherman Act restraints. I am talking about what economic restraints were there on this grocery business?

Mr. Coyle: The approach I would take to this question is that the continual growth of the chains and the decline in the market share enjoyed by the smaller chains, the growth of the larger chains and the decline of the market share of the smaller chains and the independents, the decline in the number of stores operated by these smaller chains and independents, and the increase in the number of stores and the market share of the chains, when you consider these at the same time, indicate that the smaller grocer is having a harder time getting by, and the chains are accounting for a larger and larger percent- [fol. 2662] age of the total business in the area, and this results from the advantages of the chain operation.

The Court: Of course if we are going to level everything off and make everything equal, you might just as well close shop and everybody go back to the days of the sticks and stones, because you can't level everybody off. One man works longer hours, he is more proficient, he is a better advertiser, he senses public relations, many thing enter into these factors.

Furthermore, counsel, don't overlook the fact that many of these small businesses that closed, closed to open larger stores.

Mr. Coyle: But they all didn't, or there would be just as many stores. That would be a closing and an opening.

The Court: Supposing he closed three stores and opened one big one?

Mr. Coyle: That would be a decline in the number of stores.

The Court: But suppose the volume of that store out-ranked the volume of the three stores ten for one.

Mr. Coyle: If that were generally happening, then the market share of the independents would have gone up instead of down over this period.

The Court: I think that the market share is important, but I think you place too much emphasis on [fol. 2663] market share, that is, in the relevant line of industry here in the commerce, because we are only dealing with 43 per cent of the commerce here.

Mr. Coyle: In the ten largest chains.

The Court: 43 per cent.

Mr. Coyle: But 43 per cent compared to the percentages in Brown, for ten firms to have 43 percent, compared to the percentages—

The Court: What per cent would be considered reasonable? Give me some idea.

Mr. Coyle: It is not a question of what per cent would be considered reasonable. When you have 43 per cent and that per cent has been growing, you do have a trend toward increasing concentration. I don't think the word "reasonable" should get into it, though.

The Court: There ought to be some yardstick or some lines of demarcation somewhere. I feel sorry for the lawyers that have to advise clients nowadays. They are up against a real problem. Because whoever is in the antitrust department in Washington at the particular moment may disagree with them. Then the next 6 years from now or 6 months another man might say, "Well, it is a different situation."

There must be some elasticity, but where is the norm here, where is the standard to guide men in their [fol. 2664] business affairs? That's a problem.

Mr. Coyle: We just have the two cases, Brown and Philadelphia, and we have to try to gauge our norms from them right now.

The Court: That's what we are trying to do and we are having a rather difficult time as far as I am concerned.

Mr. Coyle: It is a hard job, I would agree. But I think when you have the third and the sixth largest firms in an area such as this, and when you have this movement toward increasing concentration in terms of market share, and when you have this prior history of mergers in this market, then I think that the third and the sixth,

representing combined 8.9 per cent, and the ten largest having 43 per cent, and the 20 largest having 56 per cent, I think that's on the side of the norm that establishes an illegal merger.

The Court: You see, another thing, counsel, completely overlooked by the courts, generally speaking, they never give any thought to management. And believe me, management is an important thing in any business.

You can take the finest business in the world and let a father run it for 40 years and make it a huge success, and then turn it over to a ne'er-do-well son and he can break it in 2 or 3 years. Management is so important in [fol. 2665] these things, and finding management today is much more difficult than people realize.

I might give you an incident. About 7 years ago, 8 years ago, I had a call from a gentleman who said, if I could find him an executive in a certain line between the ages of 38 and 43 he would start him off at 50,000 a year, and after 3 weeks we found none available.

Mr. Coyle: Yes, your Honor.

The Court: So there is a problem. Management does enter into these circumstances.

I don't know who managed the stores for Safeway up in New York, but whoever he was if I were the Chairman of the Board he wouldn't have stayed as long as he did. Not because he may not be a fine fellow, but the results were pretty bad from the standpoint of the stockholders. And that's why you are supposed to be in business, to earn money for the capital investor.

Mr. Coyle: Yes. The problem with that, of course, in terms of this Act, is that you couldn't possibly enforce an Act like this on the basis of business motives, which is what this amounts to.

The Court: I am not talking about business motives; I am talking about the equation. One of the problems in these cases is the effect of management, whether this increase—how much of this increase is the result of [fol. 2666] management. I suppose you might think that's irrelevant.

Mr. Coyle: I would probably think that's irrelevant. Certainly you have the increase, you have the trend towards concentration. It might be that we would get the best

management in the United States if we had one company controlling the automobile business. Maybe if we could combine Ford and General Motors it would be a better management.

The Court: Well, they did one good thing, apparently. They did take one man out of the automotive industry that apparently has been doing a rather sensational job with the government. They need more of them. So maybe the experience that he had has been rather helpful in government. We could use more of it.

I am just pointing out to you one of the problems. All of these problems come to me, because I can't help but approach it from some practical point of view. I can't eliminate the practical viewpoint entirely. And the trouble with all these formulated rules coming down from the higher courts is that there is nobody wise enough to formulate all the rules to cover man's activity from now on out. You have to sort of meet them as they appear on the scene.

It is like going hunting. If you went hunting with a gun and you met an Indian, in those days in the wild west, who has a gun, you stop hunting and fight the [fol. 2667] Indian. It is the circumstances that you have to meet.

I am wondering in this case if the picture is as clear as you think it is. Why this change in the circumstances or in this area, why has this change come about? I am wondering if it is as simple as you think it is. In other words, there are so many factors that come into play that I am wondering if we haven't overlooked some of those factors.

Mr. Coyle: I don't believe that the criteria are the factors—are all the factors that may have contributed to this increase in concentration. The thing we look at is there has been this increase in—

The Court: Now I have finally gotten you pinned down, I think. In other words, you are now at the point that I think you have been contending all along, that it is mere concentration alone that is the whole thing.

Mr. Coyle: No. It is the increasing concentration, the history of mergers, which have contributed—

The Court: That is concentration. I am not talking

about lack of concentration. More concentration is the thesis of your case, is that right?

Mr. Coyle: And the fact that we have a merger between two significant competitive factors in this general competitive market, namely, the Los Angeles Metropolitan Area, and that they have merged, and as a result of that [fol. 2668] merging, concentration has further increased, Shopping Bag has been eliminated as an independent firm, the purchasing and the conduits and the whole operation, the distribution, the warehousing, the advertising of the two firms has been combined into one, and that one firm has 8.9 per cent of the total business.

The Court: Now I think you have finally laid it on the line. I think your case now has been summed up rather clearly in your last statement. In other words, what you are saying, in effect, as I understand you, is that in this area, in this relevant area, which is the Metropolitan Area, there has been an increase by the more substantial—you call them significant companies—in the dollar volume, in the percentage, and thus now in order now in this early incipient stage to be sure it doesn't happen in the future, stop it now.

Mr. Coyle: Between these two firms. One factor you left out, your Honor, is that there have been prior acquisitions in the area which have contributed to this increase.

The Court: I think that is inherent in the case. Some of it, at least, is attributable to that.

Mr. Coyle: I think we said 73 per cent, your Honor, of the increase in concentration.

The Court: In other words, this is an effort—[fol. 2669] the Supreme Court says, if I remember correctly—let me see my notes on the Brown Shoe case just a moment. This really is where I run into trouble. The court says: "Section 7 requires a prognosis of the probable future effect."

This is like having a doctor listen to your heart now and tell you how long you are going to live. That's about what that amounts to.

It may be ticking beautifully for the moment, and 30 minutes later after an e.k.g. you walk out on the street and drop cold dead.

This is what the court is saying. It requires a prognosis of the probable future effect.

You agree with that, don't you?

Mr. Coyle: That's what the Supreme Court said, yes.

The Court: Well, it makes it rather difficult for a man who is as earthy as I am, to look into the future, the crystal ball, and see what it is going to be, from the facts before this court.

Mr. Coyle: I think the facts before this court are the facts that were before the court in Brown Shoe, and the facts before the court in Brown Shoe as it related to the horizontal phase of the case, the facts that were before the Supreme Court, or the court, in the Philadelphia Bank case.

The Court: You may well be right, counsel, because [fol. 2670] in the final analysis the Supreme Court has the final say on this matter.

Without saying that I have decided yet, I may decide contrary to your views and I may well be not upheld by the Supreme Court, but that isn't bothering me in the slightest, not the slightest, as long as I do what I think I should do here.

Frankly, I have a difficult time with this case, and with the Philadelphia Bank case, in discriminating—if that's a bad word I am sorry I used it—in discriminating between dicta and holding. That is the great problem I have in those two cases.

I assume things said in the Supreme Court decision can be dicta, as well as what is said in the District Court decisions. I have great difficulty in trying to arrive at what is dicta and what is not in these two cases.

Don't you have that problem somewhat, counsel?

Mr. Coyle: Yes, your Honor.

The Court: I mean no disrespect to any particular gentleman of the Supreme Court, but I say it because I have studied these cases and studied them, and you would think with long study that somewhere on the clear blue horizon would come a light. But up to now the light hasn't completely hit me, and I am concerned about the case, still [fol. 2671] concerned about it, about the proof in the case.

I say these things to let you know that with all the study that I put into it, it is like reading a book that

you don't know who is the hero, and you join the hero for a while, the man you think is the hero, and it turns out to be the villain, and you change over, and the first thing you know you have to change back again.

In reading these cases I have that problem. I am surprised that you lawyers haven't that problem. I try to lay these things on the line so that you can take my thinking, analyze it, and maybe throw it back to me and maybe change my thinking, or maybe enlighten me.

I think your statement is rather clear-cut now, and I think I rather fully understand your position. And I think it could be that that's the theory of the Supreme Court decision. Whether it is the holding, I am not too sure.

Do you follow me?

Mr. Coyle: I don't follow the distinction between the theory and the holding—

The Court: The theory can be nothing but conversation and dicta. For example, I can mention one case, without naming it, in which the Supreme Court laid down the rules [fol. 2672] to follow in the future. To me that is pure dicta, because there was nothing pending before the court as to what would happen in the future in those particular matters. And I don't know how you can lay down the law on something that is not pending before you.

Mr. Coyle: I think that case probably laid down the rules that the Supreme Court has been following ever since, though.

The Court: I am talking about a criminal case in which they enunciated the rules that the District Courts would follow in the next 20, 30, 40 years, until a new change came along. That's what I mean. I think that's probably dicta.

Mr. Coyle: All right.

The Court: But I want to say this thing to you. I think this afternoon we have come to grips, that I now understand your position much better than I have heretofore.

Mr. Coyle: I am sure I understood what you said, that you understand what my position is to be now. I am sorry I didn't make it clear.

The Court: I don't mean to be criticizing. It may be my fault.

Mr. Coyle: It seemed that our brief said that.

The Court: It may have.

Mr. Coyle: I wonder, though, if your Honor [fol. 2673] could possibly explain for my own benefit how you think that the proof that we are offering differs from the holding of the Supreme Court in *Brown*—

The Court: It is a big enough job for me to try to decide this case; for me to enter into that, I might be here a week and still not finish. I don't think I will attempt that.

Mr. Coyle: Another point raised, I think, was the statement that the record shows that the consumer will only drive up to three to five miles to purchase groceries.

I think the record showed that Von's and Shopping Bag consider the over-all draw area of its stores to be five miles; that the average customer in the Los Angeles metropolitan area is willing to drive for at least ten minutes about four miles in order to do grocery shopping; and that between 10 and 35 per cent of all customers of Von's and Shopping Bag stores come from outside the immediate trading area of the Von's-Shopping Bag store.

The Court: I don't think there is any dispute about the testimony. I think what I said was—I don't remember what I said, except that I believe I said that generally the area was three or four miles, three, four or five miles.

[fol. 2674] Mr. Coyle: A lot of customers come from outside that area. 10 to 37 per cent.

The Court: 10 to 37 per cent?

Mr. Coyle: Yes.

The Court: For example, no one can tell me why a person would go to—let's say that you lived in a city where they had two Safeway stores and your house was located exactly halfway between the two stores, what do you think would prompt a person to pick one of the stores over the other Safeway store?

Mr. Coyle: Choosing between one or another of the Safeway stores?

The Court: Yes. Assuming that they are identically distant in miles and traffic signals and to get to and from.

Mr. Coyle: I suppose there would be so many variables, even in addition to those. It might be that the woman had a friend working in one of them, or she liked the produce display. I don't suppose both Safeway stores would be equal in their produce displays. Or she might—even though driving was almost the same, there were the same number

of traffic lights, for some reason or another she would decide to go to one or the other.

The Court: There would be many, many reasons. [fol. 2675] It may be that when you asked the butcher to cut the meat thin, and he cut it thick, you took a dislike to him and went to the other place because he would cut it right. Is that right?

Mr. Coyle: Any number of things.

The Court: It is as variable as the whims and fancies of a human being. That's about the situation?

Mr. Coyle: I would think so.

Then I think the court raised the point that some evidence or some exhibit indicated that only six of the Shopping Bag stores were serving the same areas as the Von's store prior to—

The Court: I think I saw somewhere where there were six or seven, only those that were actually in competition with each other. Why? Do you disagree with that?

Mr. Coyle: I think Mr. Von der Ahe, or the defendant Von's in answering an interrogatory stated that seven of the Shopping Bag stores competed.

The Court: Let's take it at seven.

Mr. Coyle: There was additional evidence. One of the studies introduced by one of the defendant's expert witnesses indicated that there were four additional Shopping Bag stores that competed with Von's stores. And there was testimony that 20 of the existing Shopping Bag [fol. 2676] stores were located within ten minutes driving time or approximately four miles distance of the Von's stores.

The Court: I don't think that matter is too crucial in the case, frankly.

Mr. Coyle: I don't either, because we have this other stipulation, this other thing about the general competitive pattern.

The Court: It is the general competitive pattern which, as I understand it, is the thing that counts.

Mr. Coyle: I would agree with that, your Honor.

Another point that was raised was an exhibit proposed by—introduced by the defendants, which showed that in 1953 there were ten chains of more than ten stores, and that by 1962—I think it was 1962—there were 24 chains of ten or

more stores. However, the exhibit also showed that during the same period of time the chains of four to nine stores declined from 30 chains to 22 chains. So basically this was chains of four to nine stores increasing into chains of ten or more stores. So there was a decrease in the number of chains of four to nine stores of eight, and an increase in the chains of ten or more stores of fourteen.

The Court: In the stipulation I notice—that is on page 2, [fol. 2677] paragraph 3—it says: “The following table shows the breakdown of the concerns operating in the Los Angeles metropolitan area in 1962.”

Mr. Coyle: Yes.

The Court: There were ten or more—those with ten or more stores were 24, and four to nine stores 22.

Mr. Coyle: Yes.

The Court: Two to three stores 104.

Mr. Coyle: Yes.

The Court: I suppose it is a natural inference that these are all growth situations. They didn't just start out with ten stores or nine stores.

Mr. Coyle: Except you do have this one factor; that the four to nine stores, as a matter of fact—incidentally, this stipulation came from one of the defendant's exhibits to which we have objection, so we didn't stipulate to the first half of the exhibit, that is, the 1953.

The Court: You had what objection? This is the first time I heard it.

Mr. Coyle: We raised objection when this exhibit—

The Court: Did you specifically point out to the court wherein it was objectionable?

Mr. Coyle: We have in these comments we made on [fol. 2678] their exhibits and testimony, your Honor.

The Court: Well, I am afraid in the normal course that isn't the way to make an objection, counsel.

Mr. Coyle: We objected at the time it was admitted, as to this exhibit, your Honor.

The Court: You did?

Mr. Coyle: Yes.

The Court: Did I rule on it?

Mr. Coyle: I am not sure.

The Court: I must have been out of the courtroom or something was wrong, because I don't remember.

Mr. Vaughn: Your Honor, this was not an exhibit; it was the affidavit of Godfrey Lebhar in which all of these statistics were set forth.

I remember specifically handing that affidavit to your Honor separate and apart from all other affidavits and stating to your Honor that this is what I regarded as the most important expert witness testimony in the case.

I do not remember any objection to it.

Mr. Coyle: This man was deposed, your Honor. The deposition was introduced.

The Court: I know that. That is perfectly proper. But I just was wondering if you are now objecting to something that was not objected to during the time of [fol. 2679] the trial.

Mr. Coyle: It may be our position went to the weight.

The Court: I think that's what it did.

Mr. Coyle: At least we didn't want to stipulate as to this prior study for the year 1953, because we did have these questions of weight.

The Court: I understand your position in that regard.

Mr. Coyle: There is no question, also, that we do agree there has been an increase in the total number of chains in the area. We just couldn't agree that this man made an accurate count.

The Court: I understand that. I don't think there is any dispute in the increase in the number of chains, if you mean ten stores or more, or four to nine stores or more, or even his three stores.

Mr. Coyle: His figure showed the four to nine stores had gone down from 30 to 22.

The Court: Well, I haven't paid any attention to that, because there is no substantiation. But I notice that your ten or more store situation is 24.

Mr. Coyle: That is correct. The chains are growing. There are other exhibits in the record that indicate the growth of the chains.

[fol. 2680] The Court: Do you consider two or three stores a chain?

Mr. Coyle: It is a matter of terminology.

The Court: I know it is, that's why I am asking it.

Mr. Coyle: I would consider it a smaller chain, yes, your Honor. I wouldn't consider it one of the—

The Court: It is better to be bound, if I want to go free, by a small chain than a large chain; isn't that what you are saying?

Mr. Coyle: No. I am just saying it is a smaller chain. I consider two or three stores a chain.

The Court: Aren't these small, as you call them, chains an integral part of the competitive factors in the market?

Mr. Coyle: Yes.

The Court: A very influential factor in the market, these two and three-store smaller chains?

Mr. Coyle: Yes.

The Court: Well, there are 104 of them in this relevant trade area.

Mr. Coyle: That's right, your Honor. I don't think we have any problem with respect to this.

I may not understand your Honor's point.

The Court: I think you do, and I think you have [fol. 2681] answered me. I believe you have.

Mr. Coyle: I was going to point out some of the other matters with respect to these chains.

In 1953 there were 704 chain grocery stores in the Los Angeles metropolitan area, and by 1962 the total number had increased to 1,085. In 1953—

The Court: Now, that includes of course the smaller two and three-store operation?

Mr. Coyle: That's right.

This next figure, then, in 1953 there were seven hundred—I am sorry—in 1953, chains of ten or more stores accounted for 57 per cent of all chain grocery stores in the Los Angeles metropolitan area. And by 1962 they accounted for 68.2 per cent. That's about 11 per cent more, of all chains in the Los Angeles area. In 1953, the 40 chains with the most grocery stores operated 574 stores. By 1962 the 24 chains with the most grocery stores operated 739 stores. So you had 24 firms in 1962 operating more stores than the 40 largest chains, in terms of stores, operated in 1953. So you do have this more and more stores coming under fewer and fewer chains.

The Court: I suppose I am not supposed to weigh the benefits to the public, am I? It would be better to go back to the good old days when they kept the fish without [fol. 2682] ice, salt mackerel in the salt barrel, and the cheese out on the counter with a knife handy to cut it when

you came in and a fly swatter. That's the old days. So that was the individual grocer as I remember him. Of course, he may have to stop while making change to swat a fly, and maybe even hit you.

Mr. Coyle: I don't think we have to choose between those alternatives in the context of a merger case. It would only stop a merger of two large chains; it wouldn't destroy either of the large chains. They would still be there if they didn't merge.

The Court: Of course, we haven't come to the time yet, but if I should rule in your favor there would have to be some kind of remedy, and I suppose what the Government would want would be to have them dispose of the stores that they had acquired. I suppose the purchaser, just as an aside for a moment—suppose the seller says, "I don't want them back," can I order him to take them back?

Mr. Coyle: The seller has long gone, your Honor. The seller is a dissolved corporation.

The Court: That's what I say. So when it comes to the relief time—

Mr. Coyle: Relief is a problem. But we will have to face it.

[fol. 2683] The Court: Would it be all right if Kroger came in and took them over, or what's the new concern that just came in?

Mr. Knight: Jewel Tea?

The Court: What was the new one—Kroger?

Mr. Coyle: Kroger, yes.

The Court: I am sure you would object to that, wouldn't you?

Mr. Coyle: I am sure we would, too. That would be a merger between Alpha Beta and—

The Court: Who is not in here that could come in? What national chain would be available to come?

Mr. Coyle: I don't know, your Honor. I am sure what we would ask would be to restore the status quo. Four years have elapsed. In other words, set up two separate chains.

The Court: Who would operate the other one—the Government?

Mr. Coyle: We would have to face that problem. I am sure that our position on relief—we couldn't answer is a

vacuum—our position on relief would be realistic. It would have to be.

The Court: I suppose in these cases, according to what the Supreme Court indicates, you should decide the question of [fol. 2684] legality first, and then get out your charts and pencils and try to find out what to do next.

Mr. Coyle: That's correct, your Honor.

The Court: In other words, build a scaffold and then locate the man to hang.

Mr. Coyle: No. I think you should find out whether it is legal or illegal transaction.

The Court: I agree with you that it has to be decided.

You don't think the court should give any consideration at this time to what should be done or could be done?

Mr. Coyle: No, I don't, your Honor.

The Court: All right. Go ahead.

I think somewhere along the line in this world of ours today we are going to have to wake up and become realistic, work out some kind of a system that at least requires if a company is going to merge, require notice to be given to someone, and then at least have a hearing, before waiting until this time and then attacking the concern and leaving people with all the financial problems, the tax problems that exist.

You wouldn't unwind the tax problem here for the next 25 years in this situation. I wouldn't be a bit surprised to see them in the courts for the next, at least ten years, over tax problems.

[fol. 2685] Mr. Coyle: I can't really answer this in a vacuum. There might be an easy way to divest. I don't know. I will have to look into it.

The Court: I guess we don't consider that now. But I couldn't help having it run through my mind.

Mr. Coyle: I am sure we have to face this problem ourselves. The unfortunate thing is that there have been so few final litigations thus far. It takes so long to get them litigated.

The Court: As I said before, probably the original jurisdiction ought to be in the Supreme Court on these cases. It would save a lot of wear and tear, wouldn't it? It would on me, I will tell you.

Mr. Coyle: This is one of the few cases where we intervened prior to the acquisition.

The Court: Of course I am in this situation, counsel: You will recall—I believe one of our judges, Judge Mathes, had this case, and I think he had the hearing on the matter originally, and, of course, in all fairness to him, this, too, was before the Brown Shoe case came down.

Mr. Coyle: That's right, your Honor.

The Court: What effect that may have had on Judge Mathes I can't say. But he certainly acted, and acted after [fol. 2686] a hearing, and then the parties proceeded to go forward. I have forgotten when it was that the Brown Shoe case came down. What date was it?

Mr. Coyle. June 25, 1962.

The Court: And I think Judge Mathes acted in 1960, or was it '61?

Mr. Coyle: 1960; March 28, 1960.

The Court: Then I believe the case was transferred to another judge, this is because of the condition of the calendar here, and finally it landed with me, and here it is.

Mr. Coyle: The only other matter that I think is listed, at least in my listing of the questions that the court raised, is I think Government's Exhibit 36, which is one of the Marshall exhibits, State Board of Equalization exhibits. This exhibit showed that there were 119 multiple outlet openings in 1960, and 128 single outlet openings.

The Court: I have made so many notes, counsel, that they are almost as voluminous as the record in the case, so I have to go back and find it. I wrote that down somewhere.

At any rate, go ahead. I wrote those figures down.

Mr. Coyle: I just want to point out that the same series [fol. 2687] of exhibits—this is a series of exhibits prepared by the State Board of Equalization—it shows that there were many more closings by single outlet firms than by multiple outlet firms; and other exhibits show that of the 29 stores obtaining permits to open—of the firms obtaining permits to open stores doing two million or more a year business, of the 29 of those permits, 18 were taken by the ten largest chains and 7 by the next ten largest chains. Which means 25 out of the 29 were taken by the 20 largest chains.

Exhibit 39 in this same series shows that the bulk of the discontinuances of permits—I mean 77 per cent of all dis-

continuances of permits during this period was by the stores doing under \$500,000 a year.

The Court: Counsel, I wonder if it enters into this picture—I don't believe there was any evidence, but I think one has to use some common sense in these things, now we are living in an age where the whole trend is toward volume, as I mentioned here before, everything is volume, even if you are losing money. Volume. Well, if you are going on the theory of volume, low prices—this is not new, this was even advocated during the days of the NRA, the idea was to increase the efficiency of the workers, increase the volume and to lower the prices. And generally speaking this is sound business, because if you can run a [fol. 2688] concern and do a hundred million dollars a year business gross volume and make a million dollars profit, why, you are still in business, but if you do one million dollars, you cannot make anything like a million dollars, on a ratio of 1 per cent. 1 per cent on a million dollars is practically nothing. These concerns, I am afraid, are largely running on volume.

I think there was some testimony, maybe it was from Mr. Von der Ahe, I think I asked him the question, what was considered in the business today the going earnings, what they considered coming out with. If I remember correctly I think he said around 2 per cent. I think his concern did a little better than that, if I recollect. But I am sure around 2 per cent on volume is about what the average would be.

Am I wrong about that?

Mr. Alsop: You are correct, your Honor. I think he testified that his percentage was 2.2. Most of the chains actually are between 1 and 2 percent.

The Court: That's what I thought.

Mr. Alsop: There are studies which indicate the single store operators do get a higher percentage, because they don't have the overhead.

The Court: They have to. That's what I am pointing to, they have to because of lack of volume. Sometimes this [fol. 2689] results in them having to get a little better price. So it may be that that is one of the features that enters into this competitive situation. Although it is hard for me to believe that a person—I guess it is true, though, the old saying is that some of the housewives will spend

five dollars in gas and oil and wear and tear to save ten cents.

Mr. Coyle: It is also probably a fact, as one of the defendant's witnesses said—we quote from him in our brief—even though the chains might not be selling for less money than the independents, housewives think they are and for that reason they go to the chains. They just have that consumer image.

The Court: This image business has come into vogue in the last few years, and I guess it is nothing but advertising.

Mr. Coyle: That's right, your Honor.

The Court: So if we are going to believe advertising, we can be influenced to most anything.

I remember, even, when one of the cigarette companies was advertising that cigarettes would aid digestion.

Maybe some people believe it. I can't conceive of it. But I think it is possible, I guess.

Mr. Coyle: I think this pretty well answers your questions.

[fol. 2690] The Court: One thing we accomplished, counsel. I think I more fully comprehend now exactly your position.

Before you leave the lectern I would appreciate it if you could restate exactly the same statement you made just a little while ago. Did you write that down?

Mr. Coyle: I didn't. But I think we said it in our brief.

The Court: I don't think you said it quite in that fashion, because I read your brief. Give me the page so I can re-read it. I will need to re-read it.

Mr. Coyle: I will have to find it. I think if you look at pages 11 and 12 of our brief, which we filed last Friday, our memorandum dated March 19, 1964, and entitled Government's Memorandum on the Issues Presented—

The Court: I have it before me. That was filed March 20th, I believe.

Mr. Coyle: It was dated March 19th.

The Court: That's right.

Mr. Coyle: Start at page—line 28, page 11.

“This merger united under one control and management two of the largest and most important separate competitive entities in the relevant market area. It ended”——

[fol. 2691] The Court: Let's stop there. Let's assume that

to be true for the purposes of this discussion. Now go ahead.

Mr. Coyle: "It ended the independent existence of an expanding chain of 38 supermarkets with annual sales in excess of \$84,000,000."

The Court: I don't know whether that is true or not. Because the evidence showed, as I recollect, that there was some concern about the progress of that company. You are speaking now of Shopping Bag?

Mr. Coyle: That's correct.

The Court: There was some evidence of the owner that he was concerned about that the volume was increasing but the profits were not.

Mr. Coyle: But they were still making profits.

The Court: Counsel, making a profit is one thing, but—it is like the talk about inflation, you hear every day, and I notice it even in some of the fine writers, saying that stocks are a hedge against inflation. Well, there is nothing that could be more erroneous, because they are not a hedge against inflation, unless the earnings are increasing. If your volume is increasing and your profits are not increasing, it is usually a bad sign. Something is wrong.

Mr. Coyle: This statement says: "It ended the independent existence of an expanding chain of 38 super-[fol. 2692] markets with annual sales in excess of \$84,000,000."

The Court: Right. But what I am talking about is the interpretation of expanding. You know you can expand—it is like a balloon, you expand it and it comes to a point where it pops.

Mr. Coyle: There was no evidence that I know of that this was near the popping—

The Court: No, no. But there was evidence in the case that the management was concerned about the progress of the company.

Mr. Coyle: They would have to jack up the management then.

Mr. Coyle: That is not easily done. You can't just call a coffee break and do that. You have to get the management.

Mr. Coyle: I am sure it wouldn't be a defense in a Section 7 case to say that, "This looked like the best business step for us to take."

I think the defense would have to be a lot tighter than that.

The Court: We start out on ice and end up on water. I am not saying it is a defense. I am merely pointing out to you in connection with this expanding situation, there was evidence to the effect that this expansion was creating concern with the management, because the profits were [fol. 2693] not accompanying the expansion of the volume. That's all I am pointing out.

Mr. Coyle: All right.

The Court: These economic factors are things that I think the court should consider and have the experience to consider. But I am afraid too often they are not considered.

Mr. Coyle: I think you have to look at the history of the corporation. It seems to me, as I remember it—I don't have all the exhibits before me—as I remember it, the history of the corporation was that its profits hit an all-time high in 1958. That's Shopping Bag. There was a strike in 1959. Their profits went down. Their profits were also down in '60. I think that's the fact. It may be that the profits hit an all-time high in '57, went down in '58, went down further in '59, which was the strike year; but this was not a firm that had much of a history of decline in profits.

The Court: I am not saying they had a history of decline in profits. Who was the man who testified, what was his name?

Mr. Alsup: Mr. W. D. Hayden, former president, your Honor. W. R. Hayden.

Mr. Coyle: He served an affidavit and——

The Court: Counsel, let's not be too technical. The affidavit, which is considered here, is testimony, and [fol. 2694] that's what I read, in which he said that he was concerned about the progress of the company. That's all. It isn't a decisive point, but it is one of the economic factors that is apparently skimmed over in these cases. You can increase volume and go broke. You probably won't remember, but one of the great companies of America, one of the truly great packing companies of America, lost a million dollars a day for 90 days back years ago, and it was at the top of the ladder in distribution of meat products. What do you think happened to the company? The volume

may not have decreased, but they made the wrong buys at the wrong time. They went broke.

You are probably surprised to hear that a company would lose a million dollars a day for 90 days.

Mr. Coyle: That's a lot of money.

The Court: I would say it is considerable. Go ahead.

The first part we agree, I think for the purposes of discussion, that the statement is true. The second part I am merely pointing out a variable that might come into play.

Mr. Coyle: Then on line 32:

"It increased concentration and resulted in a single corporation controlling 8.9 percent of all retail grocery distribution in the economically significant Los Angeles Metropolitan Area."

[fol. 2695] The Court: I don't think there is any dispute on that.

Mr. Coyle: Then, following, the next paragraph. I suppose we should skip the first sentence, because that's argument. Then starting line 4, page 12—

The Court: Here is the whole statement of your case, it is coming right now, that's right.

Mr. Coyle: "A merger of this magnitude, occurring in this market, which has a definite history of prior mergers and increasing concentration, cannot be reconciled with amended Section 7."

The Court: We understand each other thoroughly. That's your case. In other words, you are saying that because this is—whatever "magnitude" means—that because of a merger of this significance, magnitude, that it is inconsistent with and the Act was intended to stop it.

Mr. Coyle: That's correct, your Honor.

The Court: I think I fully understand your case and I am much better off in the understanding, but I have not yet made up my mind.

Mr. Coyle: Maybe the brief is not clear.

Then we undertake, after that, to discuss, and we think rebut these various matters that—

The Court: I have been all over that, counsel.

I suppose we ought to take a recess. How much [fol. 2696] time do you want? Will we be able to finish by 4:00 o'clock?

Mr. Alsop: I think we will.

I think in response to the court's question I sounded

smug and complacent. It came out differently than I intended. I certainly have been around enough in these economic matters that you can't be smug and complacent, and that's true in any lawsuit. But I don't think we will need more than a half hour to an hour, your Honor.

The Court: All right. We will take—

Mr. Coyle: If your Honor please, I would like to call attention to the quotation from Judge Hand in the Aluminum Company case, which occurs in Footnote 28 of Brown Shoe. It says:

“Throughout the history of these antitrust statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve for its own sake, and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.”

The Court: Well, with all due respect to Judge Learned Hand, he was indeed a great judge, but I can't understand how he gets the privilege to decide that this country should be cut up in small units.

Mr. Coyle: I think he was saying that Congress had decided.

[fol. 2697] The Court: Frankly, I don't think Congress has intended that. And maybe I am in error. Maybe the Supreme Court will say entirely differently.

I don't think it is so much a question of small or large, necessarily. It is a question of what is the competitive situation, what effect? Is it probable that it is going to suppress the competition, which in turn results for the benefit of the public, the consumer?

Mr. Coyle: We can't get over to making the public benefit the test. That is the Sherman Act when you get over there.

The Court: Do you think I have to eliminate that entirely from this case? If it develops in this case from all the evidence that it was absolutely certain beyond peradventure of a doubt that a combining of two concerns would result in great betterment to the competitive situation, that I still would have to rule that it was contrary to Section 7 of the Clayton Act?

Mr. Coyle: If it developed in this case that a merger

of great benefit to the public also would substantially lessen competition or tend to create a monopoly, you would have to rule that it violated Section 7 of the Clayton Act.

The Court: Counsel, you have added on to my question. What I am trying to say is, let's assume that two [fol. 2698] companies—let's take another field where there are not so many. Let's say some field such as the sale of bread, that two companies got a hold of 50 per cent of the bread in this community, and the evidence showed clearly that it was redounding to the benefit of the bread eaters of this community to such an extent that prices were reduced, that distribution was aided, that the quality of the bread was increased, that the public's benefits were greatly increased—now, 50 per cent is certainly an enormous part of the market, isn't it?—would you be able to say just from the 50 per cent alone that that would be contrary to the proscribed things in Section 7?

Mr. Coyle: You would also have to look at the market structure—

The Court: The competitive situation?

Mr. Coyle: But the consideration would be whether the merger would or might lessen competition or tend to create a monopoly; not whether it would benefit the public.

The Court: I understand that. But, counsel, you veer off every time I use the words "competitive situation." The purpose of these laws is to keep virile and vigorous competition, is that right?

Mr. Coyle: To prevent concentration that might destroy competition.

The Court: I think the Congress was trying to [fol. 2699] make one step beyond the Sherman Act, of course, and trying to say here where it becomes clear that there is a possibility—not a possibility, but a probability that there is going to be a substantial lessening of competition, then the courts should act. But I am wondering if inherent in that whole definition, which is not a very clear-cut definition, is the competitive situation.

What was the competitive situation when this case was being tried, and prior to that time, what was the competitive situation, and what did this merger do to the competitive situation? If it increased competition, you certainly would say it was not in violation of the Clayton Act, is that right?

Mr. Coyle: I would have to retreat, to resort to the

statement we just read from our brief, that if the factors which we rely upon in our brief occur, the probability is that this merger will lessen competition or tend to create a monopoly. When we meet that burden of proof, we—

The Court: Suppose the court concludes from all the testimony that it is not probable that this merger would substantially reduce competition, but on the contrary from all of the evidence it indicated that it might increase, substantially increase the competition in the relevant trade area; now, assuming that that factually could be sustained, wouldn't I be compelled to rule against you?

[fol. 2700] Mr. Coyle: I think that the two alternatives are really alternatives. If the court could conclude from all the testimony that competition would not be lessened, then we would not have established the other points that we allege in our brief.

The Court: That's what I am saying exactly.

Mr. Coyle: But I think that we would lose, not because of what the other side put in, but we would lose because of our failure to make our proof as to those elements which we have in our brief, and which we just read into the record.

The Court: What I am saying, it seems to me, Mr. Coyle—I think I fully understand you now, and I think that your statement was probably even more clearcut than that enunciated in your brief on page 12, which begins at line 4. But I think that carries the message, as they say in patent law, that has the teaching of your case in that one sentence. That is, a merger of this magnitude occurring in this market, which has a definite history of prior mergers and increasing concentration, a fortiori violates the Act. Right?

Mr. Coyle: Yes. Of course that embodies, also, this other paragraph, line 28 through line 2, starting on page 11.

The Court: But this is the teaching of your theory right [fol. 2701] here, isn't it?

Mr. Coyle: I would say the two paragraphs, your Honor.

The Court: Which paragraph is that?

Mr. Coyle: Starting on page 11, line 28.

The Court: Oh, yes. We have taken that for this discussion to be true.

Mr. Coyle: Yes.

The Court: But this is really the theory of your case

right here, beginning on line 4, "A merger of this magnitude"—is that right?

Mr. Coyle: Yes, sir. I would say both paragraphs, but I think we are quibbling.

The Court: We will take a recess until 3:30.

(Recess taken.)

ARGUMENT ON BEHALF OF THE DEFENDANTS

The Court: All right, counsel. Let's see. You are Mr.——
Mr. Vaughn: Vaughn.

The Court: I believe that's correct.

Mr. Vaughn: Judge Carr, there is one aspect to the government's argument, which was repeated on many occasions, and which they ended up on, as a matter of fact, that I think is worthy of comment, and that is the test that the government seems to think is applicable in a Section 7 case. That test has been repeated by the government on [fol. 2702] several occasions and seems to have to do with the fact that these are two substantial concerns in an economically significant market area. In that connection I would like to invite the court's attention to Footnote 38 in the Brown Shoe opinion, which reads in part as follows:

"Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anti-competitive effect of the merger."

The Court: What is that page, counsel?

Mr. Vaughn: Again, I have the Law Edition, I am sorry to say——

The Court: That's all right. I will find it.

Mr. Vaughn: Footnote 38. And the court, also in that connection, had of course said that each merger had to be functionally viewed in the context of its particular industry, and an industry that had to be by necessity unique in every case.

In that same footnote and right after the sentence which I have just quoted, the court cites, with apparent

[fol. 2703] approval, Pillsbury Mills, a case decided by the Federal Trade Commission.

I think there is some very significant language in that decision, which I would like to read to the court.

The Court: Before we do, let's take a moment. Let me re-read what you just read. I have read it before but just one second.

Mr. Vaughn: Yes, your Honor.

The Court: All right. Go ahead.

Mr. Vaughn: In Pillsbury Mills the Federal Trade Commission states as follows:

"Competition cannot be directly measured; No single set of standards can be applied to the whole range of American industry. No single characteristic of an acquisition would of itself be sufficient to determine its effect on competition. For this reason it would not be sufficient to show that an acquiring and an acquired company together control a substantial amount of sales, or that a substantial portion of commerce is affected."

The court, then, or the Commission then has a Footnote No. 29, and that footnote reads as follows:

"The attorneys supporting the Complaint suggest the following test for Section 7 cases."

[fol. 2704] Parenthetically, this is the test which the Commission rejects, and which in this case the court in Brown Shoe refers to. Here is the test which the government suggested:

"Where a leading factor in the relevant market having a substantial share of that market, acquires another factor in that market also having a substantial share of that market, the inference arises that competition may be substantially lessened in the lines of commerce involved."

That was the test rejected in Pillsbury.

To my thinking it is the same line that the government is suggesting to the court in this case.

The Court: By the way, let's see what is the date of the case and who was on the Supreme Court.

Mr. Vaughn: This case was decided in 1955. It was cited with approval in Brown Shoe in 1957, which—I beg your pardon—1962.

The Court: That was 1955?

Mr. Vaughn: That was decided in 1955.

The Court: What is the citation?

Mr. Vaughn: Federal Trade Commission—

The Court: I have it right here. But I mean the Supreme Court ruled on that, didn't it?

Mr. Vaughn: No. This was never taken to the Supreme Court. The Pillsbury case was decided within the [fol. 2705] Federal Trade Commission and never got any further. But, as I pointed out, it was cited with apparent approval in the Brown Shoe opinion, suggesting that this mathematical test which the government suggests, which is really no more than just a per se test, is rejected by the Supreme Court.

The Court: That's the question. That's the trouble here.

Let's go now and refer to what brings us to Footnote 38. It says—may I just read that?

Mr. Vaughn: Yes.

The Court: Quoting on page 322 of the U. S. Reports. It says:

“That is, whether the consolid. 'ion was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly [fol. 2706] be taken into account.”

That is one of the statements in the case that I, without directly referring to it, have been talking about. All of these factors. Then Footnote 38. I hadn't placed much em-

phasis on the Pillsbury case, but I do note, as you point out, that they do cite it, and in so doing they say:

“Subsequent to the adoption of the 1950 amendments, both the Federal Trade Commission and the courts have, in the light of Congress’ expressed intent, recognized the relevance and importance of the economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case.”

I don’t know just what that means. Then going on:

“Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anti-competitive effect of the merger.”

[fol. 2707] Well, this is, without knowing it, what I have been talking about. I didn’t realize it. I remember now having read it. Maybe I got the germ of thought there.

Mr. Vaughn: Yes, your Honor. It seems to me, if I may, that the Government has isolated just a few factors, not all of them, and has erected a per se test based on those factors, which is precisely the test that was rejected in the Pillsbury case.

The Court: I don’t know whether the words “per se” fit it, or not, but it comes somewhere in that area that the Government—as I understand Mr. Coyle, he is saying that on the assumption—I think for the purposes of the argument we conceded that the merger did unite under one control and management two of the largest and most important separate competitive entities in the relevant market area. I don’t think you dispute that, do you?

Mr. Vaughn: No.

The Court: There we jump over to the next step, and that is: “A merger of this magnitude, occurring in this market”—you notice the word “this” in both cases—“which has a definite history of prior mergers”—and

there certainly is a history of prior mergers here—"and increasing concentration"—I think there is some increasing concentration——

Mr. Vaughn: I think I would take, maybe, some exception [fol. 2708] to the Government's position with respect to those.

The Court: Maybe as to degree, but I am talking about there has been some concentration. What brought it about there is great dispute.

Mr. Vaughn: Yes, your Honor. And I think there is some dispute as to whether or not there is concentration.

The Court: Then it says: "... cannot be reconciled with amended Section 7."

So in some respects it almost amounts to a per se test.

Mr. Vaughn: I think so, your Honor.

And I would like to return to the question of increasing concentration and the mergers in this market, but I would next like to point out to your Honor that the Philadelphia Bank case, following the Brown Shoe case, did seem to erect a near per se test in cases where there was what the court called an undue market share controlled by the two companies that had merged. And in that particular case they seem to indicate that unless there was some mitigating factors, some clear evidence to the contrary, that a 30 per cent market share would violate the Act.

The Court: Did they say 30 per cent?

Mr. Vaughn: Yes, they did.

[fol. 2709] The Court: The share there was 36 per cent.

Mr. Vaughn: They went on to say, however, that the test applied in Philadelphia Bank and applicable to the facts in Philadelphia Bank lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect, in light of Congress' design in Section 7 to prevent undue concentration.

[fol. 2710] The Court: As a matter of fact, I think I made a note of that when I read the case.

Mr. Vaughn: So unless this case is one inherently suspect, or involves undue concentration, Philadelphia Bank really isn't applicable here. And I suggest to your Honor that a case involving 8 per cent market share does not have those characteristics, and I would like to refer to the decision of the three-judge court, consisting of Judges Pope,

Sweigert and Zerpoli in *United States vs. Crocker-Anglo National Bank*, recently decided. That was a bank merger case of which your Honor is aware, I am sure. In that case the court said, after discussing Philadelphia Bank and the percentages involved there:

"Here, in contrast, the proposed merger bank, Crocker-Citizens would have but 9.7 per cent of the deposits in the relevant area and 9.3 per cent of the loans and discounts. As the above figures indicate, the increase in Crocker-Anglo's percentage of deposits, now 7.2 per cent, would be only 2.5 per cent through the addition of the deposits of Citizens. In view of these statistics, and in view of the size and extent of the other banks listed in the foregoing tabulation, there can be no inherent likelihood that competition [fol. 2711] will be substantially lessened, for it is readily obvious that the merger will not produce a bank controlling an undue percentage share of the relevant market, and will not result in a significant increase in the concentration of banks in that market . . ."

If 9.7 per cent is not——

The Court: I have forgotten; is that one of the cases on appeal?

Mr. Vaughn: It is not. This is a decision on a motion for a preliminary injunction to prohibit the merger.

The Court: What happened to the case finally, what is its progress?

Mr. Coyle: It is still pending. No appeal was taken on the preliminary injunction. We appealed one preliminary injunction, and the court found it didn't have jurisdiction over a preliminary injunction, so we didn't appeal the Crocker-Anglo.

Mr. Vaughn: It seems to me, then, in light of those decisions, they form a framework that we might well apply to this case, and it seems to me that this is not an appropriate case for the sort of per se test that was used in Philadelphia Bank. It is one where all of the economic factors must be considered, where the government cannot just take a few isolated factors and throw them in here and say this causes a violation; but, instead, must go ahead

[fol. 2712] and meet their burden by showing all of the economic facts which actually demonstrate a reasonable probability of a substantial lessening of competition. And I submit, your Honor, that they have utterly failed to introduce any proof beyond the few considerations that they have placed before your Honor, which would show this lessening, and I don't believe those considerations show any lessening of competition. They don't show any competitor who went out of business by reason of this merger.

The Court: They don't have to show that, of course.

Mr. Vaughn: That is only one thing that they could possibly have shown that they did not show. They have not shown any members of the public—

The Court: The evidence is no different from any other case. It may be more difficult, but you still are required to show by the evidence produced in court that there is a probability of substantial lessening of competition.

Mr. Vaughn: Yes, your Honor, I believe that's so.

The Court: Now, the question is whether or not the government has proved that in this case.

Mr. Vaughn: I agree with that wholeheartedly, and I also would submit to your Honor that they could not. The government has talked about—

The Court: Before you move on, counsel, I would like [fol. 2713] to ask you, if it won't hurt your argument any; I am sure it won't, any more than it did Mr. Coyle's—

Mr. Vaughn: I invite your Honor's questions.

The Court: You asserted at one time in this argument that you felt that the competition, the competitive situation, had increased. I would like for you to more or less give me a little further information of what your thinking is on that.

Mr. Vaughn: I think that I said that I thought that competition had increased since the merger. I don't necessarily attribute that to the merger. Although I will state one basis on—

The Court: Never mind whether it is attributable to the merger. Since the merger, I am talking about the date of 1960, while this suit has been pending, what can you point out to me that would indicate, from the evidence of

course, that this situation instead of substantially lessening competition, or the probability of lessening it, it has in fact increased it?

Mr. Vaughn: Let's take the one thing I can think of that is perhaps directly attributable to the merger. There is testimony in the record that as a result of the merger the Shopping Bag Stores, which are still competing in the individual communities where they are located, have actually been upgraded, they are better competitors now. [fol. 2714] That is reflected in the testimony of several witnesses.

I think that——

The Court: You had better watch out, counsel; you may say now that they are such powerful competitors that they are running the other people out of business.

Mr. Vaughn: I don't think they are. They are making the other people run a little faster.

There is no evidence in this record that a single store next to Shopping Bag, or within shopping distance of a Shopping Bag store, has gone out of business or has lost a nickel. There is no evidence as to that. And I know of no information indicating that. But it may be that that is one function of the merger, that it has increased competition in that it has upgraded the Shopping Bag Stores as competitors.

I am completely convinced that the independent can out-compete a chain. I have heard it said so many times, I have seen it reflected in these affidavits, and I have seen the reasons why they can, that I am absolutely convinced, as Mr. Von de Ahe said, that if he wanted to make—that many chain executives, as your Honor has noted, have gone out of their high-paying jobs to open up a grocery store, always in competition with a chain, and have succeeded——

The Court: I don't know how high the pay was. Maybe that was one of the inducements.

[fol. 2715] Mr. Vaughn: I always go back to Mr. Goldstein who was the executive vice president and general manager of Food Giant. He saw that chain rise, from 1958 to 1962, from 19 stores to 59 stores or 52 stores. Shortly after he left they added seven more. He must have been making pretty good money, I don't know what is was, but

he went out and he took a Food Giant store that was bound to lose money in competition with a brand spanking new Von's Store right across the street, and he took that opportunity to get back into the retail grocery business, and he says that he has made as much money, if not more, than Food Giant ever made out of that store long before the brand spanking new Von's Store that was put across the street.

I am convinced that any chain operation is not as efficient and cannot really keep up with an experienced, able, hard-working independent who has greater flexibility, who has greater control of his business, who can charge the same prices, because he can buy as cheap, if not cheaper than any chain, and who can afford to his customers that magic ingredient, which not being in the grocery business I don't fully understand, this magic ingredient of personal touch which seems to attract customers, and which all of these retailers say is the secret to their success.

The Court: Counsel, there isn't any doubt about it, but the personal touch can be important, and it sometimes dis-[fol. 2716] appears from the chain operation.

For example, I remember driving into a filling station, I believe it was down in Alabama, where I have never seen such service in my life. You felt like you didn't want to leave the station. The thing was in absolute white, it was clean, I have never seen such a clean place in my life, I have never seen such efficiency and such courtesy, and I noticed that they had 40 pumps, and I thought to myself how can—it was in Mobile—how can a concern run a station like this and make money? So I asked one of the chaps what was the secret. He said, "The secret is that the boss is over here about 12 hours a day and if somebody doesn't live up to the standards, he is fired immediately." But, he said, "The people come from far and wide here to get this service, because we will do everything, even wash their car if it is necessary, to get their business."

So I do admit that the personal service angle is great. But, on the other hand, a person has to have a volume if he has a big store, to meet the expenses, to pay the help and the costs, and to still make enough money to consider himself as having a good living wage. Isn't that right?

Mr. Vaughn: That is correct, your Honor. It seems to

me that these independents are proving that it can be done. [fol. 2717] The Court: Some of them are, I think, but not all.

Mr. Vaughn: As long as some of them are, if there are some who are making money in the grocery business, who are successful, who are able to expanded their businesses, add new stores, then it is quite obvious, it seems to me, that it can be done.

Now there are some——

The Court: I think that perhaps that does follow, counsel, that the proof that some reasonable number have done it tends to show that it is not just some one exceptional person that is doing it.

Mr. Vaughn: That's right. And it is the people with training and experience and ability, and who are willing to work hard. I imagine it is hard work in that grocery store if you have to get down to the early produce market at 6:00 o'clock in the morning and your store doesn't close until 9:00. That's hard work.

The Court: Any man that loves work will usually make a success, counsel, but they are coming fewer all the time, those that love work.

Mr. Vaughn: I think that the grocery business over the years has attracted a lot of people who are not competent, not able, not experienced.

I would like to read you just a little something, one sentence from the affidavit of W. R. Hayden who started [fol. 2718] this business with one little store and developed the Shopping Bag chain.

"Ambition and money are not enough to succeed in the grocery business, or in any other business, in my opinion. The principal requirement is sound management."

The Court: I think you have to have sound management, but usually if a person has money and ambition, he has the prerequisites to work, and work is the secret of most everything.

Mr. Vaughn: I agree with that wholeheartedly.

The Court: The great lawyers who talk about their great ability, it comes from work. The great surgeons, the great businessmen, I think you will find in 99 cases out of a hundred that they were hard workers, long hours and devotion to work.

Mr. Vaughn: The grocery business has traditionally been one that was fairly easy to get into. Your Honor will recall the instance of the young man 24 years old, his name was Lester Eaton, he was a witness for the government, after working six months in a grocery store he bought it for \$1,000. That's all he had in the world, was a thousand dollars. Now, he happened to be ambitious and intelligent, an able young man. Within a few years he had bought a plot of ground across the street with the profits he had made out of the grocery store for the sum of \$30,000, on [fol. 2719] which he plans to build a supermarket.

It was easy to get into the business for this young man, and he will no doubt be a great success. There are others for whom it is just as easy, who aren't going to be successful, who aren't going to be as able or as experienced, and they are going to lose out. And perhaps this is the reason for the decline in certain grocery stores.

The Court: This young man, as I remember, had worked in a grocery store first.

Mr. Vaughn: He worked for six months in the grocery store he bought.

The Court: That isn't too much time.

Mr. Vaughn: Maybe he was lucky and he worked awfully hard. And I think probably he did. But there are others who aren't going to work that hard.

In any competitive business—I would be surprised if there was any competitive business in which there were no failures. That is just one consistent with the idea of competition.

The Court: Well, a lot goes into making a choice of location, picking the right area, the right community, and most of that comes from previous experience. A man who has been in the grocery business long enough may come from Timbuctoo, but he knows what brings people into a grocery store. And the same bee that eats the same honey [fol. 2720] in Africa or Asia will probably eat the same honey here. The question is that experience teaches you how to be in the right place to meet those customers and serve them. So experience has a lot to do with it. [fol. 2721] I think one of the things that stands out in this case is the fact that these people who have gone out from these operations and have made successes have done so

mainly because they have had great experience in the business.

Mr. Vaughn: Yes, I think that's right.

The Court: I don't think it is to be expected that someone who has absolutely no experience should be able to open up a grocery store or a restaurant, or anything else, and expect to be successful. It takes some understanding of the business.

I believe the average life of a restaurant, I am told, is two weeks.

Mr. Vaughn: Is that right?

The Court: I think that the average person thinks that he can step in and throw on an apron, get a skillet out and cook something that the public will like. It only takes them about an average of two weeks to find out he is wrong. I was told that, whether it is true or not, that the average life is two weeks.

So the human equation has to enter into it. Go ahead. I interrupted you.

Mr. Vaughn: Not at all, your Honor. I invite your interruptions, because as you have indicated, I would like to know what is on your mind and hopefully be able to [fol. 2722] answer the questions that are on your mind.

Absent any question at the moment, I would like to turn to the question of the definite history of acquisitions, which the Government has talked so much about. They had a Dr. Mueller with the Federal Trade Commission, sitting back in Washington, sit down with a group of statistics and tell us how many mergers there had been here. He listed the mergers, the acquisitions by firms, such as Mayfair, Alpha Beta and Thriftmart, in the period 1949 to 1958. He neglected to state however—and the evidence now shows—that those three concerns sold more stores than they acquired in the same period of time. There was a net loss in number of stores for those concerns during that period of time.

Dr. Mueller also told us about the mergers that Fox, McDaniels and Yor-Way had accomplished.

Each of those firms in 1960 failed, and it is generally attributed to the fact that they expanded too rapidly with too little capital. They acquired too much, in other words, too quickly.

The Court: Those three were Fox, Yor-Way and what?
Mr. Vaughn: McDaniels.

The Court: Yes.

Mr. Vaughn: Each of those concerns went out of business. Most of their stores went to smaller concerns, independents. 18 of Fox's more than 40 stores were acquired by Food Fair, not by reason of any merger, really, it was by order of the United States District Court in a bankruptcy proceedings that Food Fair entered this market. That also, it seems to me, is significant, because each of those firms were in the top 20 in 1958, the year the Government continues to talk about. By 1960, however, by the end of 1960, or perhaps by the end of 1961, they were bankrupt, they were out of business. And that, almost necessarily, if you add together their percentages in 1958, means that after 1958 there was a decline in the share of the market of the top 20.

The Court: How many stores, right offhand, did Fox, McDaniels and Yor-Way represent, counsel?

Mr. Vaughn: I can give you that information as of 1960, your Honor.

The Court: That's what I mean.

Mr. Vaughn: I have trouble reading my own exhibit. Just a minute. Fox had 39.

The Court: 39?

Mr. Vaughn: Yes, your Honor.

The Court: All right. Go ahead.

Mr. Vaughn: McDaniels had 17, and Yor-Way had 19.
[fol. 2724] The Court: How many does that total? 78?

Mr. Knight: 73.

Mr. Alsup: I have got 75.

The Court: Give it to us again. Maybe I got the wrong figures as we went along. It was, first, 39—

Mr. Vaughn: 39 for Fox.

The Court: 19—

Mr. Alsup: 17 for McDaniels.

Mr. Vaughn: 17 for McDaniels, and 19 for Yor-Way.

The Court: That's where we made our mistake. That's 75 stores, is that right?

Mr. Knight: 75

The Court: We have no evidence as to the volume of business, do we, on those stores?

Mr. Vaughn: Yes, we do.

The Court: I don't recollect it.

Mr. Vaughn: As of 1960 Fox had 4.2 per cent of total grocery store sales in the Los Angeles Metropolitan Area.

The Court: Fox did have, that's right.

And the next one, 17 stores?

Mr. Vaughn: McDaniels had 1.1 per cent.

The Court: And the other one had 1.1, approximately? [fol. 2725] Mr. Vaughan: No. Yor-Way had .7 per cent. It was 19th in 1960.

The Court: May I see that exhibit for a moment? Is that our exhibit or your copy?

Mr. Vaughn: It is our copy.

Mr. Coyle: I think you have my copy of that exhibit some place.

The Court: Do I? You are right. Thank you. I thought I had given it back to the clerk.

Go ahead, counsel.

Just taking a quick look, as I remember, this exhibit sets out the sales in dollars, doesn't it?

Mr. Vaughn: Yes, it does, in thousands of dollars.

The Court: Well, thousands of dollars, yes.

Now, Von's at that time was \$85 million in 1960, is that right, approximately?

Mr. Vaughn: Your Honor, this, I should add, for all of these concerned is projected on the basis of six months' figures, which is all we had available. This was collected in major part by the FBI.

The Court: Now, let's take the Fox Markets. How many at that time do we have? It shows 48 here, doesn't it?

Mr. Vaughn: Maybe I misspoke myself. Just a [fol. 2726] moment.

The Court: Am I looking at the wrong column?

Mr. Vaughn: Yes. I am sorry. I gave you the wrong information. I am sorry. Fox Markets does have 39 stores, but it only had 3.6 per cent of the market, it is the eighth one down on the list, and had sales in 1960 of \$41,430,000.

The Court: In other words, what I was coming to, it had about half the volume of Von's, approximately—

Mr. Vaughn: Yes, your Honor, that's correct.

The Court: —with 48 stores, as contrasted with Von's of, what was it at that time?

Mr. Vaughn: After the merger it was 64—

The Court: No, I mean Von's before.

Mr. Vaughn: Before the merger they had 27, or 28, I beg your pardon.

The Court: 27 as against 48, and you have about—27 stores doing a little better than two times the volume of Fox Markets; right?

Mr. Vaughn: Yes.

Again, I misspoke myself. Those 1960 sales figures are only for the first six months, and not projected out for the year.

The Court: I don't see how that could possibly be. Do you mean all of them?

[fol. 2727] Mr. Vaughn: All in 1960, that's correct.

The Court: The 85 million of Von's, in other words, is only for the six months?

Mr. Vaughn: That's right. That is after the merger, that includes Shopping Bag's figures.

The Court: And the twenty million is for the six months, also—I mean the 41 million?

Mr. Vaughn: That's correct, your Honor.

The Court: It still would be on a projected basis about a little over two times?

Mr. Vaughn: That's right.

The Court: The other one was, in addition to Fox—I want to look at McDaniels. McDaniels had nine stores, as I remember; is that right?

Mr. Vaughn: No. I think it had 17.

The Court: Let's look again. I think McDaniels had—

Mr. Vaughn: It is the sixth one from the bottom. That would be 17.

The Court: Yes. I have 16 here.

Mr. Vaughn: I don't know how that happened.

The Court: And I have the figure of 10 million 248—rather 12 million 357.

[fol. 2728] Mr. Vaughn: Are you sure you are not looking at the 1958 column for number of stores?

The Court: I am looking at—I think you are correct, counsel. I am looking at the '58 column of stores and the '60 sales volume. I am sorry.

Mr. Vaughn: That is not the clearest exhibit ever introduced in evidence.

The Court: It is a little difficult reading, but we will do the best we can.

17 stores and the figures is \$12,357,000, is that correct?

Mr. Vaughn: Yes, your Honor.

The Court: So McDaniels was doing a little more than half—their volume is only 1/7th of Von's, is that right?

Mr. Alsup: Your Honor, as of that time you have to consider the Von's-Shopping Bag merger had taken place, so you are really talking about 64 Von's-Shopping Bag stores, not the 28.

The Court: That's true, that is correct. You should divide that by almost a half, by 2?

Mr. Alsup: Yes.

The Court: So it would be about 1/4?

Mr. Alsup: Yes. And they had roughly about 1/4 the same number of stores, and did roughly about—

[fol. 2729] The Court: A fourth of the business in volume. Yet they went broke on it.

We have just looked at—was that McDaniels?

Mr. Vaughn: Yes. Yor-Way would be the next to last on the exhibit.

The Court: So they had 19 stores in 1960, and they did about \$7 million. So their volume is only about 1/7th. And that would mean the volume per store would be about three hundred some-odd thousand a store, wouldn't it?

Mr. Vaughn: You are faster than I am. But that is only for half a year, however.

The Court: That's what I am talking about. If you carried it out it would be about six hundred thousand a store.

Mr. Vaughn: I think that's right, your Honor.

[fol. 2730] The Court: I see. There you had volume to a certain extent, and—there is no evidence why they went broke.

Mr. Vaughn: I think there is in the affidavit of Mr. Engleman.

The Court: I remember that. That was a little bit speculative, though, wasn't it?

Mr. Vaughn: He was pretty intimately involved with the Yor-Way stores. He was with the Credit Managers Association, which took over and managed those stores for the creditors. He is of the opinion, and he is a man that has been in this business—

The Court: He has had a lot of experience, that is true.

Mr. Vaughn: He was of the opinion that all of these chains had over-expanded on bad capital. And another factor, had chosen poor locations sometimes at exorbitantly high rents.

The Court: It is probably the over-expansion as much as anything. At least that was the indication.

Mr. Vaughn: I think so. If you wish me to, I can go on with this.

The Court: I don't think so. While I may not have exactly every factor in mind, I think the general trail of this evidence I am fairly familiar with.

Mr. Vaughn: Actually, I have been referring to and [fol. 2731] reading from our proposed finding No. 86. I really think in our proposed findings your Honor will find our version of this case.

The Court: I am just wondering whether this experiment has been tried—maybe this is a good case to try it out—I don't think it will shock the legal profession or the judges: I might just suggest, just thinking aloud now, that each side proceed to write an opinion for me. I don't mean by that that I am going to adopt the opinion. Then I will sit down with those two opinions—I will tell you what I have in mind. When you try to write something in the form of an opinion you sometimes find that your logic fails you.

Mr. Vaughn: That's right.

The Court: You can think something and think it ever so strongly, but when you try to put it in writing, it sometimes comes up short. I wonder what you gentlemen would think about the idea. I have put you to a lot of work in this case. I don't know whether you would be willing to undertake such a problem or not.

Mr. Vaughn: I don't think we would have any difficulty writing an opinion, the type I would suggest.

Mr. Alsup: Our opinion would follow right along with the findings of fact we have filed.

The Court: There is more than are in your findings. [fol. 2732] I have suggested more today.

Mr. Alsup: Yes, you have.

The Court: It would require footnotes or discussion.

I am not going to insist that you do it, but I thought maybe this would be an opportunity to do an eloquent job

on your position and might show me where the strength lies. I grant you findings are very helpful and these findings have been most helpful from both sides in reviewing this case, because from time to time I have gone back to them; that with the pretrial order.

I will tell you this: There is no substitute for a pretrial order, particularly in this type of case. It has been most helpful.

What do you think, Mr. Coyle? Does this sound ridiculous to you?

Mr. Coyle: I have always wanted to be a judge, your Honor—

The Court: I am not sure that your opinion will be adopted, nor am I sure that other counsel's will be. Maybe Mr. Knight will dissent with what you write.

Mr. Knight: I will concur.

The Court: Do you think it is asking too much?

Mr. Coyle: Anything that would help the court.

The Court: I can decide the case within a reasonable time.

Mr. Alsup: We will be glad to do what your Honor wishes—

The Court: This is not asking you to write an opinion that I am going to publish, but it may well be—I had a law clerk recently write an opinion and he did a splendid job, except I wrote a completely opposite opinion when I wrote mine, and his opinion and mine were diametrically opposed. But his opinion was most helpful to me in guiding me to that conclusion.

Mr. Alsup: The only concern that I have in the matter, and I feel obligated to mention it, certainly this is not any fault of your Honor, it has been before three judges, we have written briefs, two or three briefs for each judge, and the cost and expense of litigation of this type is just terrible—

The Court: It is terrible. Probably I am asking you too much.

Mr. Alsup: We certainly will do anything if you think it will be helpful.

The Court: I am sure you wouldn't find it possible to do it in one evening.

Mr. Alsup: That's right.

Mr. Vaughn: Both Mr. Alsup and I have a habit of writ-

ing out in longhand. That takes a long time.

[fol. 2734] The Court: I will tell you. I have learned one thing. To cope with a machine, sometimes it is pretty difficult to learn to talk to a machine. Some people can do it, but I have found great difficulty in sitting down and thinking into a machine. I begin to wonder what the machine is going to say back to me.

Mr. Alsop: I have the same reaction, your Honor. I can't do it.

The Court: What is your idea, Mr. Coyle, about this?

Mr. Coyle: I am agreeable.

The Court: Do you have a lot of time on your hands?

Mr. Coyle: I don't have time on my hands, but I will find time.

Mr. Alsop: I am afraid it would take some time, your Honor. I am being harassed by the government on some problems for the Blue Chip Stamp Company, and I know Mr. Vaughn is. It is a question of how long your Honor would want to delay the decision.

The Court: I don't want to delay it too long. I think I will have to, frankly, go back—this is the trouble in a District Court. You cannot sit down and work continuously on a matter. If you could do that, I could probably have had this case out of the way. But each time I get about [fol. 2735] just on the findings one or two pages along, then I have to go to a trial, and the first thing you know I have a problem in that trial and I have to stop, and my law clerk and I have to research the problem and think it out. Then I go back to the case and start again and the first thing you know I have three problems on my hands.

Mr. Alsop: And you have the problem on the weekends, as was perfectly apparent yesterday, your Honor, with all of those matters.

The Court: It has been almost impossible to do any work on the week-ends because of the heavy motion calendars I have on Monday.

Mr. Alsop: You had any number of matters yesterday.

The Court: It just was a suggestion. I can see how it might be a heavy burden.

Of course, I don't want to put any burden on you gentlemen that I can assume myself.

Mr. Alsop: Your Honor did plan to write an opinion in this matter?

The Court: I don't know whether I will or not. I noticed in one of the cases, I have forgotten whether it was one of the Supreme Court justices or the appellate court, where he said, seemingly, he was shocked because, "We note there is no opinion in the case."

[fol. 2736] Mr. Alsup: There was no opinion in the case decided by Judge Thurmond Clarke. It was all findings of fact and conclusions of law.

The Court: What case was that?

Mr. Vaughn: The Bliss & Laughlin case. There was no appeal by the government there. That was true, also, in the Ling-Temco case, decided in Texas. Strictly findings of fact and conclusions of law, and no opinion, and no appeal.

The Court: Well, the appeal doesn't bother me. The only thing is, if it is appealed, I would like to have it go up in such condition that it can be readily understood without too great an effort on the part of the higher court.

Mr. Alsup: So do we, your Honor.

The Court: It may be that I will not write an opinion. I don't know. I haven't made up my mind yet. There are a lot of matters that probably could be touched upon that you would not necessarily touch upon in findings.

Mr. Alsup: Yes.

The Court: Comments of various kinds.

Mr. Alsup: And reference to other cases.

The Court: That's right.

Are you finished, counsel? I think the day is about finished.

Mr. Vaughn: Your Honor, you know me, I could go [fol. 2737] on forever on this case that we have lived with for about four years; but unless your Honor has any specific question, I think that I am through.

The Court: There is one other question and I am finished. You may not have finished on what the competitive situation was after the merger.

Mr. Vaughn: The increase in competition?

The Court: Yes.

Mr. Vaughn: It is very easy to list out a few things right off the bat, as I tried to do yesterday.

Discount houses. There is a completely new development. Milk depots is a new development. The sale of food and related products through other types of outlets, a relatively

new development. All of these things increasing competition. The entry into this market of the third, fourth, and sixth largest concerns in the nation that weren't here in 1960. Then, and really the most important aspect of the increase in competition, is the plain everyday competition provided by other conventional grocery retailers in every area in this metropolitan area.

Your Honor, there isn't one single household in Los Angeles or Orange Counties that does not have available to it many grocery stores, and I mean "many" seriously. This isn't just a generality. Four or more, every single household, and these people are competing every day for the [fol. 2738] patronage of that housewife.

Another indication, I think, of the competition here, and this may provide you, your Honor, with something to look at, which would indicate our position here, and which would give your Honor some insight into the increasing competition. From Food Mart News, dated March 6, 1964, there is an article wherein Mr. Joseph Goldberg, one of our witnesses, has a lot to say about competition in his particular area, which adds up to what is already in his affidavit and more or less brings up to date a lot of his remarks, and if your Honor would like to look at this—

The Court: No, I don't want to look at it, but give the substance of it. I can't treat it as evidence. I will treat it as nothing more than argument. I certainly am not going to be influenced in the decision of the case by it. If you want to summarize it for me, you can do it.

Mr. Vaughn: This is the man in Whittier who has a small or smaller store than any of his immediately surrounding competition. There is a Safeway a hundred yards away, and a Food Giant a hundred yards away. There are three supermarkets beating at each other on one corner in Whittier. Mr. Goldberg is an independent. He operates the King Cole store. It used to be a chain and Mr. Goldberg used to be an executive in that chain. It disbanded and he operates that store as an independent. He is able to out-compete his [fol. 2739] chain rivals 100 yards away. He has increased the sales of that store from slightly over \$2,000,000 to almost \$3,000,000.

The Court: I believe a good part of that is in his affidavit.

Mr. Vaughn: That is correct.

The Court: Did he testify or was it an affidavit?

Mr. Vaughn: It was an affidavit, your Honor.

The Court: That's what I thought.

Mr. Vaughn: He is of the opinion, as he stated in his affidavit there, that the independent can succeed. And he says in this article, your Honor:

" 'Sound hard,' after describing his operation? 'You bet' he grinned. 'That's why there are fewer independents today. But those that are in the field are making money. And, after all, they deserve it, they are working harder for it.' "

The Court: In other words, what you are saying is, as I understand it, that the evidence indicates to you that this merger has not brought about the probability of a substantial lessening of competition?

Mr. Vaughn: No question about it.

The Court: The area is still open, competitive persons being competitive opening up and succeeding?

Mr. Vaughn: Absolutely. I don't believe there is any question about it.

[fol. 2740] The Court: Don't you have to concede if we apply the test that is contended for by counsel for the government—

Mr. Vaughn: That we have to apply that test?

The Court: No. Don't you concede if that test is applied, that your merger would be contrary to Section 7?

Mr. Vaughn: Your Honor, I believe that these two concerns are, quote, substantial factors in a, quote, substantial and significant economic market.

If that's all you have to prove to show a violation of Section—

The Court: No. He goes a step further. He says—you remember, you made the argument about the Federal Trade Commission case, and he then goes one step further and says if his test is correct—

Mr. Vaughn: This business about increasing competition—

The Court: I will read it to you right now. He adds onto that now: "A merger of this magnitude"—I think you have to concede this is a merger of some magnitude in the market—"which has a definite history of prior mergers"—which there have been prior mergers—

Mr. Vaughn: There have been prior mergers, but as I tried to indicate to your Honor, none of them has been significant. I can trace through every one of those mergers and show your Honor how they can be offset by consideration [fol. 2741] ations which Dr. Mueller back in Washington didn't take into consideration.

The Court: This is the point, though, that I am making: He doesn't say what kind of mergers. He says a "history of prior mergers."

Mr. Vaughn: There have been some prior mergers.

The Court: "... and increasing concentration ..."

Mr. Vaughn: I deny it. I don't believe there has been increasing concentration. I will tell you why. Back in 1948 Safeway and Ralphs had 21.4 per cent of this market by themselves. There wasn't another concern, not one other concern that had as many as 30 stores, or as much as 3 per cent of the market. They were all small, local concerns who had begun locally with one store and were commencing to grow. Now in the next decade Safeway and Ralphs, despite the fact that they operated successfully in this area, and certainly Ralphs has been one of the most successful concerns that has ever operated grocery stores in this area, and despite the fact that they increased their dollar sales very significantly, their share of the market declined by 50 per cent down to less than 14—about 14 per cent, approximately 14 per cent.

Now, it seems to me in a concentrated industry, if the word means anything, that the market leaders don't get [fol. 2742] knocked around by small concerns that grow; the market leaders are able, at least, to maintain their position and increase it. But these smaller concerns, the Von's, the Market Baskets, the Thriftimarts, came into prominence in this decade, until in 1952, take half-way through the decade—

The Court: Let me interrupt. What does he mean by "increasing concentration"? Does he mean that the 10 markets have a larger volume of business, or does he mean that more stores are concentrated?

Mr. Vaughn: I think that what Mr. Coyle means by that, he slips on a record I have heard many times, and that is that the top 20 chains had a greater share of the market in 1958 than they had in 1948. And the top 20 chains did—

which top 20 is the real \$64 question. The top 40 in 1948 weren't the same as the top 20 in 1958.

The Court: Were there really 20 top chains in 1948?

Mr. Vaughn: I think you had to get down to pretty slim pickings.

The Court: That's the question I am asking. In 1948, talking about chains, I notice—these are the 20 we are talking about?

Mr. Vaughn: These are the 20 that were in existence in 1960, that's right.

The Court: I am talking about on the left side of the [fol. 2743] sheet here, 1948.

Mr. Vaughn: The only concerns listed here are the top 20 in 1960. We did not endeavor to set forth the top 20 in 1948, because that's different.

The Court: What I'm trying to find out is what does the record show? Were there 20 top chains in 1948?

Mr. Vaughn: I don't think there is any question, if you adopt Mr. Coyle's definition of a chain.

The Court: I understand, but I am asking that question for you, what is your contention?

Mr. Vaughn: Our contention is that there were 20 concerns operating two or more stores, if that's a chain, more than 20 in 1948, yes, your Honor.

The Court: Now answer this question, please, if you can: How many of those 20 operated five or less stores? That may be sort of an unfair question at this time on account of it requires the memory of—

Mr. Vaughn: It not only requires memory, it asks for information which I, frankly, do not have.

The Court: What figures can you take—5, 4, 6, 3, or whatever it is, and tell me what percentage, approximately, would fall—how many of those chains are four stores or less?

Mr. Vaughn: According to my best information, I think this is probably the best I can do for your Honor, the [fol. 2744] only chains that I am aware of in the Los Angeles Metropolitan Area in 1948, who had 10 or more stores, were Safeway, Von's, Shopping Bag, Ralphs, Market Basket, Alpha Beta, Mayfair, McDaniels, and A. & P.

The Court: Did Alpha Beta have more than 10 in 1948?

Mr. Vaughn: It did. It had 18.

The Court: These figures on this Exhibit AN that are listed over on the left side of the page under 1948, they don't contain all of the 20 that you consider the top in 1948, do they?

Mr. Vaughn: Would you just hold up AN so I can see it?

(Court indicating.)

Mr. Vaughn: That is AM, not AN.

The Court: These are apparently fastened together. It is AM, then. The thing that would save me a lot of extra work in going back to determine is what were the so-called 20 chains, by name, in 1948.

Mr. Vaughn: Your Honor, I don't know that we can give you that information. Some of the statistics as to market share in 1948 were derived from the Bureau of Census, which will not reveal the names of the chains in the top 20. They will give you the percentage share of the market in the top 20, but they won't give you the names of the chains.

[fol. 2745] The Court: To me it is important to know—I guess it can't be known—what is the chain and what kind of chain it is.

Mr. Vaughn: I agree with your Honor, and I wish I could provide you with the information. But the FBI went out at the behest of the government and checked a lot of information and simply was unable to come up with some of the information that would fill in these blanks.

I can tell you this, that in 1960, of the chains that were in the top 20 then—

The Court: Well, that I know, counsel. I am pretty sure about that.

Mr. Vaughn: (Continuing): Eight of them, all but 12, were not in existence, or at least did not have anything of the market in 1948.

The Court: I am familiar with that.

Well, the one thing that is missing, so far as my coming to grips with some of the things in this case, is: What was that change that took place in there? And I don't have it in the case.

Mr. Vaughn: I think you do have it in the case, your Honor. In 1952—or 1948, this area was characterized by two large chains, a group of small chains, and a lot of independent stores. In the succeeding years those two

large chains have experienced a decrease in market share, [fol. 2746] they have lost business. Why? The smaller chains of the late 1940's, in addition to which there were independents operating then, and concerns that weren't even thought of in 1948, have come along and despite the predominant position of Safeway and Ralphs have acquired a larger and larger share of the grocery business. This has resulted, the growth of these small concerns into medium-sized concerns, has really resulted in the sort of growth in the market share of the top 20 which the government is talking about. This does not indicate to me an increasing concentration of power. It really shows that the market leaders aren't able to hold onto their advantage. And when you get big enough, the small aggressive merchant who has a few stores, and his eye on a few others, can get those stores, acquire more business, and take a more predominant position in the industry.

The Court: Has Ralphs lost in its total sales since 1948? They have gone up, haven't they?

Mr. Vaughn: They have increased their total sales, and so have Safeway, but their share of the market has declined.

The Court: That is what I was coming to. You say their share of the market has in fact declined?

Mr. Vaughn: That is correct.

The Court: Whereas the share of the market of the so-called independents or smaller chains of 10 stores or [fol. 2747] less have increased?

Mr. Vaughn: That is correct, your Honor.

The Court: Do you dispute that, Mr. Coyle?

Mr. Coyle: The market share of the other chains have increased. Some of them with over 10 stores, their market share has increased, too.

The Court: I understand that.

Mr. Coyle: I understand that Safeway's Market share has decreased between 1948 and 1958. And I am not sure that Ralphs market share has decreased. Not very much. Their market share has remained about constant.

Mr. Vaughn: I think that is a fair statement.

Mr. Coyle: The market share of everyone else has increased, every other one of the top chains.

The Court: I see.

Mr. Coyle: It is only Safeway that has really gone down.

Mr. Vaughn: My point is, your Honor, that you would expect in an economy where there is concentration, if that word means anything—I guess it is a bad word in this case—if it means economic dominance, which I suppose the government says it means—if you found that, you would not find small concerns growing and taking an increasing market share. It just would not be possible. Within any practical and meaningful contention, concentration has decreased, not increased, in the Los Angeles Metropolitan Area.

The Court: I wonder if maybe in your argument it wouldn't be a better word to use to say it spread?

Mr. Vaughn: I think that's right. And it is spreading even today.

The Court: "Increasing," "decreasing" is one thing, but I think "spreading" is something else.

Mr. Vaughn: I think that's right.

I don't think "concentration" has any place in this case. It is an essentially meaningless phrase when applied to this case.

The Court: The problem is inherent in the case, but whether there is concentration in the sense that is intended is another matter.

Do you think you have had your say, counsel?

Mr. Vaughn: I think I have. I ought to ask Mr. Alsup if he has anything to add.

Mr. Alsup: No, your Honor. Yesterday morning I heard you remark to the young lady who was here being sentenced that she should choose her associates well, and I think we have done that, I am pleased with Mr. Vaughn.

ARGUMENT ON BEHALF OF THE GOVERNMENT

Mr. Coyle: If your Honor please, I would like to make two points.

The Court: All right. Come forward and let's do it. I don't think you can complain you haven't been heard [fol. 2749] in this case.

Mr. Coyle: No, that's true.

The Court: But whether you have been understood is another matter.

Mr. Coyle: In setting forth the basis of our case on pages 11 and 12, line 28 through line 7 on page 12, I just

want to point out the language is: "A merger of this magnitude, occurring in this market, * * * I think the word "this" should be underlined.

The Court: Don't you remember, I did?

Mr. Coyle: We didn't take a per se approach. We take the approach described by the Supreme Court in Brown Shoe. That is why we have been talking about this market business. That's the first point I want to make.

The second point I would like to make is that this spreading of concentration, as the court put it, in the period—

The Court: I am not calling it that. I just merely—

Mr. Coyle: I will call it that. The spreading of concentration only spread down to the top 8. When you got down to the top 8, the top 8 increased their total market share in the period between 1948 and 1958. So the other 7 members of the top 8 made up for the losses that Safeway had, so it is not as if it were spreading to the top 20. [fol. 2750] If I have made my point.

The Court: Yes, I understand.

Mr. Coyle: The third point I would like to make is that these various chains that have gone out of business or have financial difficulties, like Fox, Yor-Way and McDaniels, didn't sell all of their stores to independents. Many of their stores went to other members of the top 20.

The Court: There is no doubt about that. The record so shows.

Mr. Coyle: And the Fox Markets also were held intact to some extent and are now operated by Food Fair.

The Court: Didn't Fox go through receivership?

Mr. Vaughn: 18 of a total of more than 40.

Mr. Alsup: I think Food Giant took over 9 of the McDaniels Stores out of bankruptcy, and I gather there are hearings going on now, Food Giant would like to get rid of them.

Mr. Coyle: It is not as if they went out of the top 20.

Finally, I would like to say that this footnote 38 of Brown Shoe does mention an FTC opinion, and counsel has referred to a particular footnote in the FTC opinion as interpreting the opinion of the Supreme Court. I think that's going far afield to interpret the Supreme Court by a footnote in the FTC opinion.

[fol. 2751] The Court: It may shed light on what the court is trying to say.

Mr. Coyle: I feel the language is clear on that page, and the footnote itself. And that is the footnote we have been relying upon, your Honor.

The Court: You must concede in the sentence that cites footnote 38, the court makes a full statement—let me find it here. Without reading the whole thing again, the court, beginning at the top of the page, goes on to say: "... whether the consolidation was to take place in an industry that was fragmented rather than concentrated ..."

We will go on. Then it goes on to say: "... had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnesses foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account."

Mr. Coyle: That's correct, your Honor.

The Court: So the footnote is merely in support of that statement.

Mr. Coyle: That's correct, and I am referring to the FTC case cited in the footnote, which counsel seemed to be citing.

The Court: I think you must concede, counsel, in making [fol. 2752] a decision I have to anticipate, or try to, the probable future. Is that right?

Mr. Coyle: That is correct. There is no question but what this is controlling. This language on page 322 is very important, and we feel this is the thing we have been meaning all this time. When we use the expression "occurring" in this market," we intend to take into consideration whether the industry was fragmented, rather than concentrated, or whether there has been a trend towards merger, and whether there were more firms in the industry coming in than going out, or whether there were more going out than coming in. That is what "easy access" means.

The Court: Let me ask you one other question. This may be a sort of almost a trick question: Would you say that the relevant area that we are considering is more fragmented or concentrated?

Mr. Coyle: I would say that it was fragmented, it is still fragmented, but there is a trend toward domination, which

means a trend away from fragmentation. That is what "increase in concentration" means.

The Court: In other words, your position—it goes back to what you said a while ago, fragmentation is departing and concentration is increasing?

Mr. Coyle: That is correct, your Honor.

The Court: For that reason you think that the [fol. 2753] Act applies?

Mr. Coyle: That is part of the market structure analysis, and that's why we are not making a per se approach. That's what we mean on page 12 when we say "... occurring in this market, which has a definite history of prior mergers and increasing concentration."

The Court: All right, gentlemen.

ARGUMENT ON BEHALF OF THE DEFENDANTS

Mr. Alsup: May I make one remark. It will be short.

The Court: If it is a lawyer's remark, no; if it is a short remark, yes.

Mr. Alsup: It will be a short one.

The Court: All right.

Mr. Alsup: This amuses me somewhat. The government's theory is if a merger occurs in a fragmented industry, then you have to find it unlawful; and if it occurs in a concentrated industry, then obviously it is unlawful. Philadelphia Bank. And it really gets back to what Justice Cardozo used to criticize, the so-called tyranny of labels. Because they have to win, under their theory, under either set of facts. If it is fragmented, certainly they win; if it is concentrated, obviously they win. And obviously that is not what the courts have said.

The Court: "Obviously" of course is a label, too, isn't it, counsel?

[fol. 2754] Mr. Alsup: Yes, your Honor.

The Court: I quite agree with you in one respect, that we have arrived at an age of labels in everything, in business, in society, in everything we do, labels. And I remember trying many cases, particularly in accounting, and I always enjoyed it, because mathematics and accounting have no resemblance to each other whatsoever; one is a series of labeling, which is accounting, and the other is mathematics, which is an exact science. I don't mean to mislead you that

I have any knowledge of the two subjects, but I learned that much anyway.

Mr. Vaughn: Your Honor, would you like to have our volume of the Federal Trade Commission Decisions?

The Court: I think it is in the law library, counsel.

Mr. Vaughn: Fine.

The Court: Anything further, Mr. Coyle?

Mr. Coyle: No, your Honor, except to thank your Honor for your patience.

The Court: I have deliberately sort of gigged—I don't like to use that expression—both of you, to try to bring forth your thinking to help me in the process of determining this case. It may seem simple to you, gentlemen, on each side, but I sit in a position which supposedly is a little more objective, and I will tell you that the case has been of considerable more difficulty to me, and it has cost me a lot of time and a lot of worry, but I shall hope to have your decision within some reasonable foreseeable future.

The case will now stand re-submitted, and I am hoping within the next couple of months that I can give you an answer. Whether I will do it by opinion of findings—if I do it only by findings, I will probably want you to appear at a hearing to settle the findings. I will first go over them and may then call you to try to settle the findings. I have found that that is probably in the long run the simplest way to do it, do it right in court and settle the findings, as they used to do in the old days. So the case will stand submitted and I thank you for your arguments and the presentation.

Mr. Alsup: Thank you, your Honor.

Mr. Coyle: Thank you.

[fols. 2756-2758] IN THE UNITED STATES DISTRICT COURT

Honorable CHARLES J. CARR, Judge Presiding

No. 336-60 CC Civil

[Title omitted]

Transcript of Proceedings—December 7 and 8, 1964

Place: Los Angeles, California.

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[fol. 2759] COLLOQUY BETWEEN COURT AND COUNSEL

(Other court matters.)

The Clerk: Item 11 on the calendar, Case No. 336-60 CC Civil, United States of America vs. Von's Grocery Company, for hearing on findings.

Mr. Alsup: Ready, your Honor.

Mr. Coyle: Ready for the government, your Honor.

The Court: Well I am not ready. I didn't find until Friday afternoon at 5:00 o'clock I had a heavy calendar this morning so I haven't had a chance to read them. I don't know what happened.

The Clerk: That was Thursday, your Honor.

The Court: Thursday, but I was in trial on Friday.

Mr. Alsup: They got mislaid, your Honor.

Mr. Alsup: It was a clerical mistake. Our calendar clerk, your Honor, took them up to serve them in the Antitrust Division. And Mr. Knight was away and Mr. Disney took the original and the court's copy through error and sent them to Mr. Coyle. And our calendar clerk brought back these other copies. It was a clerical error on our part, as Mr. Knight will concur.

We apologize to the court for the error.

[fol. 2760] The Court: Can you be here at 3:00 o'clock this afternoon?

Mr. Alsup: Yes, your Honor.

Mr. Coyle: Yes, your Honor.

The Court: I don't know why you want to make a record in this case—is that what you want to do?

Mr. Coyle: Yes, your Honor.

The Court: Well, I don't have to do that.

Mr. Coyle: That is up to your Honor, of course.

The Court: What is it?

Mr. Coyle: That is up to your Honor, of course.

The Court: I don't know why you cite the El Paso case, I don't know what bearing it has in this case. I am sure you disagree with my judgment in the case.

Mr. Coyle: I don't know what your Honor is going to do yet.

The Court: Well I can tell you one thing, I am going to stick to my judgment.

Mr. Coyle: I would presume that, your Honor.

The Court: Well, I will have to read them, I guess. Maybe I won't have any further hearings on the matter, I will just sit down and take a pen or pencil and go over the findings. The record will show I have already been over one complete set, spent hours and hours of effort on them. I am wondering if this case will ever terminate. [fol. 2761] What do you gentlemen wish? How long are you going to be here, Mr. Coyle?

Mr. Coyle: I will be here as long as your Honor wants me to be.

The Court: Well, I don't want you to have to come back at taxpayers' expense. You know, I am a taxpayer, too.

Mr. Coyle: So am I, your Honor.

Mr. Alsop: Judge Yankwich indicated, your Honor, in this case in the 5 Federal Rules Decisions that it was his practice to make full and comprehensive findings, since the Ninth Circuit had directed, but he would just go through and scratch out things—

The Court: That is what I usually do, but I usually have to stop and rewrite pages.

Mr. Alsop: Well, I thought if your Honor scratched, so chose to do, our office could retype them on the basis of the scratchings out.

The Court: I wonder if you could be here—what do we have, Mr. Clerk?

The Clerk: We have one sentence at 2:00 o'clock.

The Court: Yes. I hate to be in such a hurry. I don't think I can really read these between now and 3:00 o'clock.

How about tomorrow morning, gentlemen, how are you fixed tomorrow morning?

[fol. 2762] Mr. Alsup: That is fine, your Honor.

The Court: All right. Continue the matter until tomorrow morning at 10:00 o'clock. We have nothing set, do we?

The Clerk: No.

Mr. Coyle: If your Honor please, last Friday defendants served an additional paper on us. I don't know whether your Honor is going to read it or not, that certainly wasn't called for by the schedule. Maybe we would want to reply to that paper. I just got it this morning when I got in town.

The Court: I am sure it is nothing but a reply to your statement, I glanced at it.

Mr. Coyle: Well, we are objecting to defense counsel making the findings, your Honor—

The Court: Counsel, I want to tell you this here and now, no lawyer makes the findings in this court. I make my own findings. If you are trying to jockey me into a position—if you are trying to take the position that they took in the El Paso case, it doesn't happen to fit me.

I have already been over these findings at great length, and that is the reason for this further proceeding. And that is it. I requested defense counsel to prepare specific findings. I just don't adopt any lawyers' ideas in findings.

[fol. 2763] Mr. Alsup: That is perfectly apparent, your Honor. That is why we prepared the memorandum in opposition to—

The Court: You must be looking for error, counsel.

Mr. Coyle: Your Honor, I am here under procedure, that is all, provided for the Federal Rules.

The Court: This procedure has been in vogue in the federal courts since the beginning of time.

Mr. Coyle: It has been criticized by most courts of appeal and the Supreme Court.

The Court: Let them continue to do it, let them continue. I imagine Judge Skelly writes the most of them. He must have gone up now to the Circuit Court. So maybe he will enjoy these criticisms. They don't impress me at all, not at all.

We will set this matter for 10:00 o'clock tomorrow morning. At that time we will proceed to try to arrive at a settlement of findings. If I am not to have the assistance of counsel in the preparation of findings—any lawyer, any

judge who says that is erroneous just hasn't practiced law. He just doesn't know what he is doing.

10:00 o'clock tomorrow morning.

(Other court matters.)

[fol. 2764] LOS ANGELES, CALIFORNIA, TUESDAY, DECEMBER 8, 1964, 10:00 A.M.

The Clerk: Case No. 336-60-CC Civil, United States of America vs. Von's Grocery Company, for settlement of findings.

The Court: Trying cases is one problem, but hours and hours with findings with you gentlemen is another problem, a bigger problem. And most of the higher judges who have never been around trial courts apparently don't comprehend what they are talking about when they recommend that judges draw their own findings. They don't realize, those who have never been in lower courts, that we have hours and hours and hours of work to do, paper work, and then trying cases day in and day out with all of the new law that is coming in, it is impossible, just impossible. I suppose those judges who are anxious to get promoted will go along with that idea, with such statements, but to me it is ridiculous, utterly ridiculous, the time I have spent on these findings.

Now, I am about to dispose of them without further ado. I have written an Opinion in the case on which I spent hours and hours and hours. This case has probably taken up all told several hundred hours of my time when I am trying cases on a calendar last year of over 250 cases. So what the upper courts may say in criticism of the lower [fol. 2765] courts doesn't concern me in the slightest, not in the slightest.

Now let's proceed.

I have read over the lengthy objections of the government. Now, Mr. Coyle, what is your main objection, other than what you have stated already, to the findings at this time?

Mr. Coyle: Your Honor, I think we have stated our

objections in writing. There is no main objection. We object to many of these findings.

The Court: I don't seem to find the basis of the proposition that the evidence is not in the record to support the findings.

Mr. Coyle: To some of the findings we do——

The Court: All right, let's seriatim go down the list, take the original—maybe you had better take a copy of the findings and conform it, conform the corrections as we go along. And then I will have counsel who are to prepare this—I am going to finish with this matter, I am not going to carry it on the rest of my mortal career in this world.

Mr. Alsup: Your Honor, would it be of any help to furnish you with a copy of the original findings, the changes which we——

[fol. 2766] The Court: I think I remember—the record should show that we spent at least an hour or so in chambers after I had gone over the original findings. And at that time I pointed out to counsel the various findings that I thought ought to be revised. I see that many of those have been eliminated.

Mr. Alsup: Every one your Honor objected to was eliminated or changed according to your Honor's suggestions.

The Court: When you get into the semantics or the economics of the Antitrust Division, it is almost like a patent case. Every statement you are dealing with semantics.

All right, let's start with the very first——

Mr. Coyle: Your Honor, there is one question that is puzzling me now. We are here pursuant to a letter from Mr. Figg which says that the date of hearing on the objections of plaintiff to defendants' proposed findings was changed from November 23rd to December 7th, and providing that the defendants are allowed to and including November 24, 1964, to lodge and serve a revised set of findings and conclusions and the plaintiff is allowed to and including December 3, 1964, to file objections to the proposed findings and conclusions as revised.

Now, I am unable to reconcile this letter with the [fol. 2767] approach suggested by defense counsel in the latest paper filed on plaintiff, as to why we are here.

The Court: You are here to settle findings. This has been in vogue, in practice in federal courts since before you were born, counsel. I have been doing it myself, either as a

lawyer or as a judge for 40 years, and the rules have never changed. And no judge is going to sit down and make a meticulous study or recommendations, except when he writes an opinion, to get up findings which can be done by counsel and save the court's time.

Mr. Coyle: It is our understanding that the findings we are talking about today are the work product of defense counsel. They are not the product of any conference or any hearing that the government—

The Court: That is an incorrect statement, erroneous, completely incorrect. It is part of the work product of my conference with counsel.

Mr. Coyle: I was not present, I was not notified in time to be there. There was a conference without a reporter in chambers between defense counsel and some representative of the Los Angeles office—

The Court: What are you trying to do, counsel—

Mr. Coyle: I am trying—

The Court: Recommend a dehors in chambers or something?

[fol. 2768] Mr. Coyle: No, I am just trying to find out where we stand.

The Court: You are here for one purpose, you are here for one purpose and that is the settlement of findings, settlement of findings.

Now let's come to grips with that problem and no more argument.

Mr. Coyle: All right.

The Court: Come to grips with the problem. I have said enough.

ARGUMENT RE FINDINGS

Mr. Coyle: All right. Let's look at the findings—

The Court: We are going down seriatim, seriatim down the findings.

All right. Paragraph 1.

Mr. Coyle: Paragraph 1, our excerpt from the pretrial conference order which refers to this portion of the pretrial conference order, and I believe that the pretrial conference order paragraph should have been substituted for paragraphs 1 and 2. We submit—

The Court: Well, I am going to leave it as it is. If it is

true that Von's operated 28 grocery stores—if I remember the record, the record shows that Von's is a Delaware corporation.

Mr. Coyle: It doesn't state that Von's is a publicly owned [fol. 2769] corporation, which the pretrial conference order so states.

The Court: All right. Third, what is your objection to paragraph 3?

Mr. Coyle: It is very complex, very garbled, it is almost impossible to—

The Court: Is it incorrect factually in any place?

Mr. Coyle: Only that it is not explicit.

The Court: All right. No. 4.

Mr. Coyle: No. 4. Yes, No. 4—I don't know what No. 4 means. I think it is incorrect factually, but

“For the most part, Von's Stores were located in the southern and western portions of the Los Angeles Metropolitan Area.”

That is meaningless, a meaningless statement.

The Court: It isn't to me. It is exactly what the evidence shows.

Mr. Coyle: What are the southern and western portions of the Los Angeles Metropolitan—

The Court: All right. No. 5.

Mr. Coyle: This is part of the same series they revised and distorted. The pretrial conference order—

The Court: This court is not obligated to incorporate verbatim the pretrial conference order.

[fol. 2770] Mr. Coyle: Your Honor, there is no point in entering into these orders if—

The Court: I don't care to hear any argument on that point. What is wrong factually with 5? Is there any incorrect fact set forth in 5?

Mr. Coyle: No, your Honor, but it is not good—

The Court: All right. No. 6.

Mr. Coyle: It is part of the same scheme.

The Court: Is there anything incorrect in the statement:

“As of March 25, 1960, Shopping Bag Food Stores was a California corporation operating 36 grocery stores in Los Angeles and Orange Counties, California, and two grocery stores in San Bernardino County, California.”

Mr. Coyle: That is not our objection to 6. Our objection to 6 is that it is cumulative with certain findings that counsel have drawn up and that the court apparently is going to adopt mechanically here—

The Court: Counsel, I don't appreciate your characterization. If I were you, I would desist. The word "mechanical" doesn't apply to this judge and I don't appreciate those statements. I advise you not to use them any more. I have spent hours and hours going over these findings, working on these proposed findings here. There is nothing [fol. 2771] mechanical about it. These findings are the result of conferences with me and instructions as to proposed findings.

All right, proposed finding No. 7, what is your objection to No. 7?

Mr. Coyle: We have the same objection to 7 as we have to 6, your Honor.

The Court: Any factual misstatement there, anything that isn't true?

Mr. Coyle: I don't know.

The Court: All right. No. 8.

Mr. Coyle: The same objection as to 7 and 6.

The Court: Is there no evidence in the record to support that statement?

Mr. Coyle: There may be some testimony by one of the officials. I am not even certain of this. It certainly has no relevancy to the case.

The Court: No. 9.

Mr. Coyle: It is the same garbled argumentative type of finding.

The Court: No. 10.

Mr. Coyle: No. 10 is like No. 4. And I would like to discuss No. 4 and No. 10 together.

4 sets forth:

"For the most part, Von's Stores were located in the [fol. 2772] southern and western portions of the Los Angeles Metropolitan Area."

10 says:

"For the most part, Shopping Bag Stores were located in the northern and eastern portions of the Los Angeles Metropolitan Area."

If I understand these two findings, your Honor, you could revise the names of the firms to say the same thing, when you talk about the northern and eastern portions, you are talking about three-quarters of the Los Angeles Metropolitan Area.

The Court: As I remember the evidence, one ran toward the south and one ran toward the north, and if the Shopping Bag—

Mr. Coyle: I think south.

The Court: And the other was more or less in the opposite direction.

Mr. Coyle: That isn't what these findings say.

The Court: All right.

Mr. Coyle: 4 and 10 just don't make sense, your Honor.

The Court: You can argue that to the Supreme Court. No. 11—you can try to convince the Supreme Court of that, it is all right with me. I haven't the slightest concern after this case leaves my hands.

[fol. 2773] Mr. Coyle, Your Honor, do you want to make a more specific finding than 4?

The Court: I am not about to.

No. 11.

Mr. Coyle: All right.

The Court: I have played games with your Antitrust Department about all I am going to. I am going to play no more games in this court, counsel.

Now No. 11.

Mr. Coyle: No. 11 is just not complete enough. We have objected previously to No. 11—

The Court: Anything factually incorrect?

Mr. Coyle: No, your Honor.

The Court: No. 12.

Mr. Coyle: No. 12 is factually incorrect for several reasons.

One, it attributes the reason for the merger to Von's, not Shopping Bag. They are two corporations. Now Mr. Von der Ahe—

The Court: I distinctly remember evidence in the record to the effect that Mr. Hayden was concerned about the lack of executive material developing in the company, he was concerned about the volume of business increasing but profits going down.

Mr. Coyle: That might be true, that might be true, Mr. [fol. 2774] Hayden—

The Court: Do you disagree with that?

Mr. Coyle: —might be the reason Von's and Shopping Bag found it desirable.

The Court: I don't see it.

Mr. Coyle: You see, for many reasons on line 4—

The Court: Maybe we are looking at a different thing. It says:

“12. Von's and Shopping Bag found it desirable to merge for many reasons—”

Mr. Coyle: That's right, and I say the word “reasons”—

The Court: That doesn't mean that they had the same reasons. One had certain reasons and the other had different reasons, a different set of reasons.

Mr. Coyle: We are talking about a corporation. Corporations don't have reasons—

The Court: They are operated by an executive board of directors.

Mr. Coyle: They operate through a shareholders' board. These aren't reasons advanced by the shareholders in the SEC prospectus—

The Court: All right, take up 13.

Mr. Coyle: Does your Honor—

[fol. 2775] The Court: No, I am not going to listen to that kind of argument about reasons of a corporation—I am not going to waste time when I have as much to do as I have to do, I am not going to sit here and listen to that kind of argument.

If you want to advance some argument that has something to it, but to tell me a corporation can't have a reason, it sounds ridiculous to me.

Mr. Coyle: All right, your Honor. Let's look at Proposed Finding 7—no, Proposed Finding 12(a), commencing at line 7.

“The operations of the two chains complemented each other with little overlap in the geographical areas each served.”

The pretrial conference order says in paragraph 20 that the large trade area in which the defendants operated prior to the merger was the Los Angeles Metropolitan Area consisting of Los Angeles and Orange Counties. That is the trade area they operated in. That is what the pretrial conference order says—

The Court: All right. I will pass on to something else. If you have got some real problems where the facts are not supported here, I want to see them.

Mr. Coyle: This isn't supported in our—

The Court: Anything else on 12?

[fol. 2776] Mr. Coyle: Yes.

The Court: Might as well get it on the way to the Supreme Court.

Mr. Coyle: 12(b) says:

“Prior to the merger, W. I. Hayden was almost solely responsible for all of Shopping Bag's business affairs * * *

This was a publicly held corporation with a board of directors. Maybe Mr. Hayden was on the board of directors, but I am sure Mr. W. I. Hayden was solely responsible for the operation of Shopping Bag—

The Court: I can tell you one thing, counsel, there is usually one man on the board that practically runs the show. If you don't have that experienced man—I have consulted with many corporations, there is usually one man that does the work.

Mr. Coyle: He is not—

The Court: I think we are playing with semantics. I will just take the word—strike out the word “solely” and put in—

Mr. Alsup: Your Honor, may I suggest striking out “almost solely” and put “primarily”—

Mr. Coyle: That is the same thing.

Mr. Alsup: Yes. Where it reads where the court ordered dissolution of the merger of the three companies and [fol. 2777] entered a decree that the president of the three companies could not thereafter serve following 1960 because he was the primarily responsible person for running the three corporations, and they felt that this executive could no longer work for the company, it was found to be a violation of the antitrust laws.

The Court: I suggest, counsel, somebody go to a bank and try to borrow \$5,000,000 and see if you get it. It won't be some stockholder. If it were, the company would probably be broke in six months.

Mr. Coyle: I am sure that is not one of the main troubles, your Honor—

The Court: All right. I will label "Prior to the merger, W. I. Hayden—"

Mr. Coyle: He was president of the company, your Honor.

The Court: We have got presidents of companies, counsel, that don't know what is going on, they couldn't read a profit and loss statement—I served as president of a corporation once. I directed it only to do a client a favor, because I was a lawyer, but I expected the corporation to be run by other men, other officers. All I did was sign checks and collect my own salary and enjoy a vacation each year. You have to be realistic in these things.

I am going to say "was the most actively responsible [fol. 2778] person—" Rather, I will put it "officer and stockholder carrying on the affairs of Shopping Bag's business."

Have you got it?

Mr. Alsup: Yes, your Honor.

The Court: All right. What is next, counsel?

Mr. Coyle: All right, even this line 15:

"By 1959 it was apparent that Shopping Bag's earnings and profits were declining—"

The Court: That is as obvious, it is right in the record as clear as crystal.

Mr. Coyle: "Shopping Bag's earnings and profits were declining even though its sales were increasing."

Their earnings and profit were declining for one year or for a number of years, one straight year, or two years? I don't think that is the court's conclusion that they were declining. They could have declined for two years and gone up the next year.

The Court: All right. I am going to make that finding. Is there anything further in 12?

Mr. Coyle: Yes, paragraph (c):

"After more than 30 years in the grocery business Mr. Hayden wanted to become less active, but he was

concerned about what would happen to the Shopping [fol. 2779] Bag——”

That is not Shopping Bag. That may be Mr. Hayden——

The Court: It doesn't say it is Shopping Bag, it just says in plain English here that he was concerned about what would happen if he got out of the business. That is what it says.

Mr. Coyle: Referring back to subparagraph 12:

“Von's and Shopping Bag found it desirable to merge for many reasons——”

The Court: Counsel, the Supreme Court can take the Opinion I wrote—it seems to me to be clear enough, it may not be a great document but it is clear enough for the Supreme Court to at least anticipate what I was doing.

Mr. Coyle: Yes, your Honor. I think the Opinion was clear. But I don't see any relevancy in that finding.

The Court: Well, the rules require findings, although they do permit the court to indicate that the Opinion may stand in place of the findings. But there are many facts that probably should go in the findings that I didn't include necessarily in my Opinion. In writing an Opinion you don't cover quite so wide a scope as you do in findings.

Now this may sound strange to lawyers or judges who have never spent any time in trial courts, I don't know—and I am not particularly concerned, frankly. I have come [fol. 2780] to the point where I think the more experience you have the greater detriment it is in the world. And to serve on this bench, if you are a really experienced lawyer, you have got problems.

All right, what is the next?

Mr. Coyle: This is paragraph (e), subparagraph (e) of paragraph 12.

“Prior to the merger, the Von der Ahe family owned 80 per cent of Von's stock and the Hayden family held 60 per cent of Shopping Bag's stock.”

Again this is the Von der Ahe family's reasons and the Haydens' reasons. It is not the reason for the merger.

The Court: Well, it says so, it says just as a fact, that is what it is. Now you go on and it says——

Mr. Coyle: That's right.

The Court: "It was recognized that the death of any member of either family who held a large number of these shares might create estate tax problems——"

No question about that, no question about the matter, it would. You can't die in peace any more.

Mr. Coyle: This is not a business reason for buying Shopping Bag.

The Court: What is it?

Mr. Coyle: This is not a business reason for buying Shopping Bag, this was Von der Ahe's reason and Hayden's [fol. 2781] reason.

The Court: That is true, that's right. And that is what it says.

Mr. Coyle: Except that it all relates back to paragraph 12 which purports to list the reasons of Shopping Bag and Von's——

The Court: Counsel, if that is what is bothering you, we will just take care of that in one brush of the pen, we will take care of that.

All right. We will just put on line 3, paragraph 12:

"Many of the factors——"

Well, I think we will just rewrite 12 entirely, that is the first part of 12, those three lines:

"Many of the factors which affected the officers and directors in consummating the merger were:——"

Anything wrong with that?

Mr. Coyle: It is not relevant, but there is nothing wrong with it factually.

The Court: The only thing apparently that is relevant is that—I really don't know what is relevant in this case. There are a lot of peculiar economic factors—probably if you put a student of economics on the stand, or on the bench, who had never had any experience, you would get [fol. 2782] one reaction; if you put a practical man with some experience on the bench you would get another reaction. All I can do is use the little I have learned in the last 36, 38 years and hope it will be right.

So we will change it and make it:

"Many of the factors which affected the officers and directors in consummating the merger of the two corporations were:"—

You know, I always remember a famous statement made by a great boxer and fighter, and I think I have tried to follow it. That is, "Don't fight over something just to be fighting, and don't fight until you get in the ring, you might get knocked out." That is what I feel like this amounts to, you are fighting over things that are not really of any consequence.

All right, what is next?

Mr. Coyle: Let's go to No. 13. No. 13, it says:

"Shopping Bag had expanded rapidly through internal growth. However, it suffered from a shortage of qualified executive personnel"—

The Court: Well, that has been testified to.

Mr. Coyle: Shopping Bag was expanding, it was opening stores all over the area, it was a profitable corporation. I don't think that was sustained—

[fol. 2783] The Court: I remember a company back in 1929 that lost a million dollars a day when it was expanding, and went broke.

Mr. Coyle: Shopping Bag wasn't losing money, it was making money.

The Court: Well, the evidence showed that—I distinctly remember the evidence was to the effect—and it wasn't refuted—one of the problems they were having was they were trying to expand, were expanding, and they were not developing the executive personnel to take care of the business.

Mr. Coyle: But they were not suffering from it, Judge, they were expanding, they were making money.

The Court: I don't think there is a company in America today that isn't suffering from a shortage of qualified executive personnel.

Mr. Coyle: Perhaps they didn't—

The Court: All right, I am going to leave it, that is the evidence as far as I am concerned, and it is right in the record.

Mr. Coyle: Then it says:

"Moreover its earnings and profits had steadily declined——"

Those years from 1957 were their highest sales.

The Court: I will hear from other counsel on that steadily [folio 2784] declining.

Mr. Alsup: Perhaps your Honor——

The Court: Is that correct, is that correct, steadily declining?

Mr. Alsup: They declined in the years 1958, 1959, following a good year in 1957, your Honor.

The Court: Yes, but what happened, this merger took place in——

Mr. Alsup: March of 1960.

Mr. Coyle: 1959 was a good year, your Honor.

Mr. Alsup: Your Honor, the beginning of the decline, shown on page 6 of the findings, shows that in that same period Von's profit and net had gone up——

Mr. Coyle: Definitely——

Mr. Alsup:—during the same period of time that Shopping Bag's was declining.

The Court: That is true, Von's was far more efficiently operated from the evidence than was Shopping Bag.

Mr. Coyle: Yes, your Honor. I would say also your Honor refer to the profit figures on page 6.

The Court: I am just going to start with:

"Moreover its earnings from——"

What was that date, that year?

Mr. Alsup: 1957.

The Court: "—1957 had declined despite a steady increase [fol. 2785] in total sales."

I think that is now correct.

Mr. Coyle: You might also note that 1959 was a strike year, your Honor.

The Court: Was a what?

Mr. Alsup: It is reflected in Von's——

Mr. Coyle: That would reduce——

The Court: Look at Von's in a strike year, what happened then?

Mr. Coyle: Your Honor, I think we have to face the fact that Von's was an unusually profitable corporation. I am

sure that these percentages of net income, net profit to total sales, compare favorably, would compare favorably with Safeway. If I remember, your Honor, Safeway's profits are about 1 per cent of total sales.

The Court: Well, I am going to leave it that way, I am going to leave it.

Mr. Coyle: To get it clear, your Honor:

"Moreover, its earnings and profits——" what year did you say?

The Court: From 1957.

Mr. Alsup: Yes.

The Court: "Its earnings and profits from 1957 had steadily declined despite a steady increase in total sales." [fol. 2786] Mr. Alsup: Yes.

The Court: These findings, as I view them, are nothing more than to bring to the fore—to save the court, the entire court, if you go on, hours of digging through this record.

Mr. Coyle: Your Honor, if they had not been prepared by defense counsel, I would say that is so.

The Court: Do you think I am going to stop and prepare findings? Well, I will just tell you I will never do it.

Mr. Coyle: I think your Honor has prepared findings and these are not——

The Court: I am in complete total disagreement with Judge Skelly's fantastic concept that judges should always prepare findings, and I am not about to do it. And no busy trial judge—such as we have in this District—is going to do it. I suppose in patent cases the trial judge ought to sit down and spend hours and hours and hours on findings.

Mr. Coyle: Your Honor is referring to line 26 on page 7——

The Court: One thing you have convinced me, hereafter, as I have done heretofore, I will go over findings and I will amend and strike out——

Mr. Coyle: Yes, your Honor, that is fine, but these findings [fol. 2787] were filed in July of 1963 and the court didn't do that——

The Court: You know, I may terminate this any moment.

Mr. Coyle: That is your prerogative, your Honor, of course.

The Court: You have come in, since you have left this

case, with the attitude that you are going to do everything in your power to aggravate the court, and you are going to succeed if you keep on. This has been your attitude—

Mr. Coyle: Your Honor, this isn't the first time I have been here—

The Court: You have been around, counsel—all right, proceed.

[fol. 2788] Mr. Coyle: That is in paragraph 13—

The Court: I hope you will read this part to the court when you read the other part, about your antagonizing the court. Go ahead.

Mr. Coyle: Yes, your Honor. Line 26 on page—

The Court: I hope you will read one other thing, while I am thinking about it, and that is that you tried to revive an issue which you clearly waived, then you tried to revive it at the last minute after the case was disposed of?

You remember the issue, don't you?

Mr. Coyle: No, your Honor.

The Court: Of the wholesale situation, you don't remember that?

Mr. Coyle: I think I know what you are referring to. I certainly didn't waive any issue at any time and then try to revive it.

The Court: I found that you did. Go ahead.

Mr. Coyle: Let's go to line 26 on page 7. "declined despite a steady increase in total sales."

That's not true. There was a decrease in total sales in 1959 as reflected on page 6.

Mr. Alsup: On the relative basis there was an increase, because that was the year we had the strike.

Mr. Coyle: There was a decrease. It is just not correct [fol. 2789] to state there was a steady increase.

The Court: I think I will just strike out all of the line—starting, "Moreover," until the end, strike it out. All right. 14?

Mr. Vaughn: To the end of the finding, or the end of the sentence?

The Court: I see no reason to put the other in. I am sure many did.

The thing we can't seem to separate, we can't separate the experienced merchandiser from the man who jumped in at the last minute with no experience.

It is now considered that anyone who has money can buy in and operate any kind of business, whether it is an automobile, airplane, or cotton gin. Those factors, of course, do not come into play in the great economics of these things, because they are not considered. But a company is no better than its management. If you talk to any experienced banker who starts to make a loan, the first thing he wants to know is about the management. That's the first thing he wants to know. And if they have poor management, you are not apt to get a loan.

Go ahead.

Mr. Coyle: All right. Down to 14, I think, your Honor. It starts out: "The parties have agreed and the court [fol. 2790] finds," and then it doesn't state what we agreed to.

We think what we agreed to we state correctly in proposed paragraphs 14 and 15, which we have submitted with our objections.

The Court: What is wrong with 14?

"... finds that the relevant line of commerce in this case is groceries and related products taken as a whole."

That is almost verbatim what the pretrial conference order says, isn't it?

Mr. Coyle: It doesn't say these products have peculiar characteristics and uses in the operation of retail grocery stores which make them distinguishable from all other products.

The Court: There is no issue in the case about the relevant—counsel, what do you accomplish by this? There is no issue on the relevant line of commerce here at all. There is only one issue, really, in this case. That is whether or not there is a probability that the competition will be substantially lessened.

Mr. Coyle: That's why we object to findings which only half state—

The Court: All right. Take up 15. I won't bother with it.

Mr. Coyle: We have the same objection to 15. We agreed [fol. 2791] to more than this. We agreed that this is the area of effective competition. They leave that out. We agreed that this is the relevant section of the country for determining the effect of this merger. All that is left out. I don't know why they left it out. They wrote 40 pages and they couldn't put precisely what we agreed to on the line of commerce and the section of the country.

The Court: Counsel, when you go to the higher court, do you have any problem other than one problem, and that is whether or not this merger will probably substantially lessen competition? Is there any other problem in the case?

Mr. Coyle: Or tend to create a monopoly. I think—

The Court: I can't believe that you are going to get up before the Supreme Court and argue this creates a monopoly. If you do, I will be astounded, I really would.

Mr. Coyle: I view it as you do, I view that as a basic issue, but I think these proposed findings are injecting all these little subsidiary issues as to whether this is the area of effective competition, which we have already disposed of in the Memorandum Opinion and in the pretrial stipulation. But these people won't put it in the findings.

The Court: Where is this inconsistent—let's take the pretrial order just so we can waste some more time.

Mr. Coyle: Look at paragraph—it starts at paragraph [fol. 2792] 20, I guess.

The Court: What page of the pretrial conference order?

Mr. Coyle: The copy I have, it is page 5.

The Court: Page 5?

Mr. Coyle: Yes, your Honor. At least in the copy I have. It is paragraph 20.

The Court: Well, there is more said about it than that.

Mr. Coyle: I say starting there. That's correct, starting there. That first sentence they leave out. "The relevant trade area in which the defendants operated prior to the merger was the Los Angeles Metropolitan Area, consisting of Los Angeles and Orange Counties."

The Court: Isn't that what they say here?

Mr. Coyle: I don't see them saying that.

The Court: Well, counsel for the other side, will you point it out to me? Maybe I don't understand what he is talking about.

Mr. Alsup: I don't understand, either.

We have agreed what the relevant section of the country is.

The Court: He said:

"The parties have agreed and the court finds that the relevant section of the country in this case is the [fol. 2793] Los Angeles Metropolitan Area, which is defined as Los Angeles and Orange Counties."

Mr. Coyle: In which the defendants operated. Where these chains operated.

Mr. Vaughn: Where is that in the pretrial order?

Mr. Coyle: In paragraph 20. It is also in the memorandum opinion.

Mr. Alsup: Your Honor, we have pointed out in earlier findings that the 28 Von's stores were located in Los Angeles and Orange County, and 36 of the 38 Shopping Bag stores were located in Los Angeles and Orange County.

Mr. Coyle: Why beat around the bush?

The Court: Let him finish, will you please?

Mr. Alsup: I think counsel is nitpicking. We have got everything here that he wants out of the pretrial order.

The Court: All right. Pass on to something else.

Mr. Coyle: No. 16, it is not a finding, in the first place, and it is not true, either.

The Court: Well, I am going to leave it in.

Mr. Alsup: It is directly from the opinion, and the opinion is directly from the evidence.

The Court: In other words, my opinion—I can't pick out a finding from that and use it, is that right? [fol. 2794] I am going to.

Mr. Coyle: This is a statement of what somebody says we have done. Which we don't agree we have done.

The Court: Well, that's my finding. And I don't know how you can come into court at this late date and contend otherwise. All you have to do is read your pretrial conference order.

Mr. Coyle: If they had stuck with the pretrial conference order, that would be one thing. But they are interpreting or amending it.

The Court: How do you interpret this, on page 12, lines 3, 4?—

“The government assumes no burden of proof as to the relevant section of the country at the wholesale level since it intends to base its case on the probable effects of the merger in the relevant section of the country for grocery retailers, which is the Los Angeles Metropolitan Area.”

Mr. Coyle: There is only one way to interpret it. It means what it says. It means we didn't try to prove what

the relevant section of the country was for grocery wholesaling. We have one section for wholesaling of meat, another section for wholesaling of dry groceries, and this would be an endless job.

[fol. 2795] The Court: All right. Take up the next one. I am going to approve that.

Mr. Coyle: This is very speculative, No. 17; it has these words "small," "usually," "typical," the word "if" in line 6. It is just a vague, argumentative finding, speculative—

The Court: There is nothing speculative about it. It is just about what I said in my opinion.

This used to be a city of, on the whole, small corner groceries. That is what it was. These stores, usually one man or one woman could operate them. Usually that was the case. They did have Safeway here, which the findings say in other places.

Mr. Coyle: What do you say when you say "usually one man or one company"?

The Court: I am satisfied with it, so I guess it will have to stand.

Maybe you can find a couple of good straw men in here somewhere and you can work on them when you get to the higher court.

Mr. Coyle: I am not looking for straw men.

The Court: All right.

Mr. Coyle: Well, we have the same objection to 18—19. It says: ". . . Safeway was by far the most prominent factor"—

[fol. 2796] The Court: I agree with you in one thing, the word "prominent" should come out.

Where do you see the word "prominent"?

Mr. Coyle: Line 25.

The Court: I will strike the word "prominent." Wait a minute. Let's put it, "During the 1930's Safeway"—I suppose you could say it was the leading chain, on the evidence, couldn't you?

Mr. Coyle: I suppose you could say that.

The Court: All right. It is said, ". . . the leading chain in the retail grocery business . . ."

All right. Proceed.

Mr. Coyle: Let's go down to 22.

The Court: 22?

Mr. Coyle: Finding 22. Page 10, line 18.

The Court: Yes?

Mr. Coyle: This statement "keeping pace with the population explosion"—

The Court: I don't find where you are talking about. On page 10?

Mr. Coyle: Page 10, line 20, your Honor.

The Court: "... keeping pace with the population explosion which this area was experiencing."

Mr. Coyle: Yes, that "keeping pace," I don't believe there was any evidence that the building of stores was [fol. 2797] keeping pace, was exceeding it, or not keeping pace.

There were a lot of supermarkets opened, and there was a lot of population explosion, but I don't think they were ever related.

The Court: I think from the evidence and from anyone who would just open his eyes you probably will find we have not only been keeping pace but going ahead.

Mr. Coyle: Then it is not keeping pace; it is exceeding the population.

The Court: Well, I am not going to change it.

Mr. Coyle: All right. Down to 23, over to page 11, lines 1 and 2.

The Court: Line 23?

Mr. Coyle: No. Lines 1 and 2 on page 11. Finding 23.

"While the foregoing figures are not necessarily completely accurate, they appear to be the most reliable which could be obtained."

The Court: What is wrong with it?

Mr. Coyle: Well, "... are not necessarily completely accurate, they appear to be the most reliable which could be obtained"—I don't know that you can say that. I think it is an improper statement.

The Court: We will cut out "not necessarily completely accurate," and just say, "The figures appear to be the [fol. 2798] most reliable which could be obtained."

I don't know that that changes it, but I will strike it out.

"The foregoing figures appear to be the most reliable which could be obtained."

That's the way it stands.

I don't know what that does or what mountain that takes down, but we will leave it that way.

You know, the thing that concerned me all my living career, I have been concerned with practical problems and getting things done. I think we are just picking away—there is an old famous saying—at carroway seeds.

We have got the roll in our hands and we are picking at carroway seeds.

Mr. Coyle: I couldn't agree more. I don't think these findings are necessary, and that's why—

The Court: Counsel, I am sorry to have to disagree with you, but I find it necessary.

What is next?

Mr. Coyle: No. 24. "The following are some of the reasons for the decline in the number of stores . . ."

The Court: Well, I have read them very carefully and if they are not in keeping with the record, then—

Mr. Coyle: There are a lot of other reasons, too.

[fol. 2799] The Court: What other reasons do you want to put in there? You are entitled to that, if you have some reasons that you want to add. What are they?

Mr. Coyle: Well, one reason would be because of the inability of small chains and independents to compete.

Another reason would be because of the shortage of acceptable sites in shopping centers for small firms and individuals.

Another reason would be the lack of financial reserves in small firms and independents.

The Court: I think we have covered that—

Mr. Coyle: I don't think—

The Court: —elsewhere.

It has been so obvious. It has been said that the larger concerns are usually favored because of their better standing and credit. I don't think there is any question but what these findings cover that.

Mr. Coyle: What I am objecting to is stating some of the reasons in this paragraph and not stating all of them. I don't see any reason in stating some of the reasons.

The Court: I don't think it is illegal, counsel, so I am going to leave it.

Mr. Coyle: It is not going to be too helpful, I don't think.

The Court: You mean to you it is not going to be too [fol. 2800] helpful.

Mr. Coyle: To anybody else.

The Court: I thought findings were supposed to be what

the court predicated its decisions on. Most of these things, as I find them, are the things that I took into consideration in deciding this case. And on the whole they have followed the outline, pretty much, of my Opinion, I think. They have filled in some details that I didn't feel I should put in the Opinion.

And I notice the Supreme Court in one case was rather critical that the material had not been sifted before it got to that court. Of course the sifting job is a big one. So I was trying in my Opinion to do that job of sifting.

Mr. Coyle: Yes, your Honor. And I have no quarrel with your Opinion; it is just coming here 90 days later to make some findings.

The Court: Be it 90 or 380, we are doing it, counsel, and we are going to continue.

Mr. Coyle: All right.

Going to Finding No. 25——

The Court: Unless you want me to open a night court. Perhaps that could be done. But I won't be here to serve it.

What is next?

[fol. 2801] Mr. Coyle: Finding 25.

"In 1948, Safeway operated a large number of stores..."

The Court: Well, I think they had, what was it, a thousand stores?

Mr. Coyle: Not in 1948. This is 1948. I think maybe they had a hundred and fifty or sixty stores, may one hundred eighty——

The Court: Isn't that a large number of stores?

Mr. Coyle: Not compared to the thousand they had back in the 1920's.

The Court: What is your contention as to why the thousand stores went out of business?

Mr. Coyle: Because they were small. Safeway was closing its small stores——

The Court: Your whole case here has been predicated on the theory that the number of stores started out with so many, population increased so much, and there are fewer stores today. The trouble with that syllogism is it starts out with a false premise, a false major premise and a false minor premise.

Of course you can draw any conclusion in the world on false premises.

Mr. Coyle: I am not here to re-argue the case, but——

[fol. 2802] The Court: I am sure you would if I would allow it.

Mr. Coyle: No. I am sure I wouldn't, your Honor.

The Court: I am sure you would be glad to.

All right. I will leave that stand.

What is next?

Mr. Alsop: On page 12, line 27, there is a typographical error. It says "three to ten." Your Opinion said "two to ten," and I didn't catch that.

The Court: What are the facts. I thought it was two to ten.

Mr. Alsop: I think the facts from Dr. Jensen's testimony and from others was three to ten, but your Opinion said two to ten, and that is perfectly acceptable to me.

The Court: I think I will just leave the "three" in.

The court might as well find a couple of errors in the Opinion. That would be healthy. If it were perfect, I wouldn't be satisfied. So we will leave it.

What else, counsel?

I know one thing. In working on this Opinion I had to do it between trials day in and day out, and it is quite a job to sit there with all the volume of exhibits and records [fol. 2803] and try to work on the case, with the interruptions, lawyers all day long, orders to sign, memoranda coming from every department of the government, cases to be tried day in and day out, motions all day on Monday. It is not very easy, believe me. I am not allowed to retire to the great sancrosanct chambers where quiet reigns at all times and I may have a dozen or so law clerks pile up the information for me. I have to do it all myself.

All of this has been done by me, counsel, not by any law clerk. No clerk has touched this case at all. So it hasn't been mechanical.

Take up the next item.

Mr. Coyle: All right. We are up to page 13, line 2.

"The market leaders, Safeway and Ralphs, were not able to maintain their pre-existing share of the total grocery store sales in the face of this increased competition."

The Court: I agree with that absolutely. The evidence proved that to me.

Mr. Coyle: Your Honor, Safeway's market share declined. Ralphs, in the period 1948 to 1958, went from 6.9

per cent to 6.5 per cent. I don't believe that is much of a decline——

The Court: Counsel, you must take into consideration that the Ralphs Stores were being closed and new stores [fol. 2804] opened——

Mr. Coyle: Yes, your Honor.

The Court: —and the volume of business——

Mr. Coyle: It is not true to say they weren't able to retain their pre-existing shares.

The Court: I will leave it stand.

Mr. Alsup: The specific facts are on line 14.

The Court: I will leave it stand.

Mr. Coyle: All right. Down to page 14. Paragraph 28, subparagraph (a), line 11. The word "opened"; I think that was acquired. They acquired that store. It was a pre-existing store.

The Court: I don't remember that. You will have to tell me, someone.

Mr. Alsup: The affidavit of Mr. Hughes, your Honor, stated that he was employed by Thriftmart, he had built this store and leased it to Thriftmart, when he left Thriftmart in 1952, I believe it was, he took over the lease on this store which he had owned which had theretofore been leased to Thriftmart.

Mr. Coyle: It was a store he had acquired from Thriftmart.

Mr. Alsup: And began doing business in the first Hughes Market.

The Court: I am not going to worry about it. [fol. 2805] Take up the next matter.

Mr. Coyle: I think that same objection runs through a number of these findings, that they say "opened" when they mean "acquired," your Honor. I think there is a difference between opening a new store and acquiring an existing store.

The Court: Well——

Mr. Coyle: When you talk about opening, you are talking——

The Court: The opening or acquiring doesn't affect the over-all picture insofar as lessening competition, does it?

Mr. Coyle: I think that it does relate to this issue of ease of entry. Change of ownerships doesn't demonstrate

anything as to ease of entry. It demonstrates somebody sold out.

The Court: It demonstrated one thing to me. One of the clearest threads that ran through this case was that the people who left the chains and went out and opened one store, and from there built up a substantial business, in this great area that you claim there was a monopoly, yet these men of experience could step out into the area, leave the companies and open a business and prosper.

Mr. Coyle: I think the evidence shows they acquired stores. They didn't open a business; they acquired some- [fol. 2806] body else's business. Some people were selling out and some people were buying stores, but I think the evidence—

The Court: Would you say they acquired the first Hughes Market, for example?

Mr. Coyle: Yes.

The Court: It wasn't a Hughes Market.

Mr. Coyle: They acquired it from Thriftmart.

The Court: I will leave it stand.

I don't think the semantics are worth belaboring.

Mr. Coyle: Let's go down to No. 29, page 16. Line 11.

"In 1922, fifteen of the smaller grocery retailers concluded that they could not effectively compete against some of the chains then doing business . . ." I don't think there was any evidence to this purport.

The Court: As a matter of fact, I shouldn't think the defendant would want that finding. I have a question mark on that finding, myself.

Well, they were competing effectively, so why am I going to make a finding that they couldn't?

Mr. Alsop: I think the affidavit of Mrs. Charles Von der Ahe and the affidavit of Campbell Stewart of Certified Grocers, your Honor, indicated that these smaller grocers in 1922, before there was a co-op like Certified, had to pay [fol. 2807] the wholesalers as much for their groceries as the chains were able to sell them at. And they had difficulty competing if they were close to one of these larger chains that could buy directly. That is what led to the organization of Certified.

I am really not concerned about whether or not it is in or not. I just thought it was part of the over-all history

which the Supreme Court has indicated is desirable in some of these cases.

The Court: The Spartan Grocery Company—of course, I happened to be living in the community when these things—

Mr. Coyle: This is 1922.

The Court: —developed.

I hadn't finished my sentence.

(Continuing) —when they developed and flowered. When the Great Depression of 1929 began, the two organizations, I guess, the Spartan and the Certified, had become grown, as far as I remember, and were doing a substantial business in this area.

Mr. Alsop: Yes. We have figures here, your Honor—

The Court: Groceries were available to anybody at every street corner and were piled up and for sale, and a lot of them couldn't be bought.

[fol. 2808] Mr. Alsop: Part of that history is reflected in the affidavit of Charles Von der Ahe. A number of these smaller grocers who could not buy directly at that time and could not get their groceries in quantity from Certified, if you will recall—

The Court: I am going to change this and put it in more adept language, in State Department language, and put it: "In 1922, fifteen of the smaller grocery retailers concluded that they could more effectively compete . . ."

Mr. Coyle: Your Honor, my objection is that I don't think that anybody knows why these 15 smaller retailers did that. This is back in 1922.

The Court: That's my conclusion from the testimony in the case, the evidence.

" . . . more effectively compete against some of the chains . . ."

What is your next?

Counsel, I believe the word is "Pyrrhic"—the victory you won there.

Mr. Coyle: I am not looking for a victory; I am trying to help in drafting these findings. I don't think these are good findings, but I don't think we are improving them very much. I am not seeking a victory here.

Your Honor, go down on page 17 to Finding 32, line 23. It says, "its members"—that is Certified's members—[fol. 2809] can buy these products through Certified as

cheaply as the larger chains can purchase them directly."

I don't think the evidence sustains that. There is no evidence as to what the larger chains paid for their groceries.

The Court: Well, I thought there was some evidence in the case—I think, as I remember it, one of the owners, maybe it was Mr. Von der Ahe, I don't know which one, testified that—not only there, but in some of the affidavits—maybe defense counsel can refresh my recollection as to what I am thinking about.

Mr. Alsup: Yes. Your Honor, it is in the affidavit of Joseph Hughes who is president of Certified and runs Hughes Markets; it is in the affidavit of Campbell Stewart; it is in the affidavit of Ted Von der Ahe; and it is in the affidavit of Albert Goldstein who, as you know, left Food Giant to go into business as a single store operator.

Mr. Coyle: I think this is what the court said in its Memorandum Opinion and the most the record sustains: That the government had not demonstrated that chains can buy on better terms than independents.

But this goes one step beyond and says that independents can buy as cheaply as the larger chains.

We don't know what A. & P. is paying for groceries or what Safeway is paying.

[fol. 2810] The Court: Well, you may be correct about that. I think I will change that.

"... its members can buy these products through Certified on a competitive basis with the larger chains."

Does that make sense, or doesn't it?

Mr. Alsup: Yes, your Honor. It is, in effect, what you said on the bottom of page 13 of your Opinion.

The Court: Does that suit you, counsel?

Mr. Coyle: I think it is better than it was.

The Court: Well, we can't get it quite up to what you want, so we will leave it there.

Mr. Coyle: All right.

Let's go to 34, if your Honor please, Finding 34 on page 18—

The Court: Of course we strike out the rest of that. "can purchase them directly." That is stricken out.

Mr. Alsup: Yes, sir.

The Court: All right. What is next?

Mr. Coyle: Paragraph 34 on page 18, line 10.

"The volume of Certified's purchases exceeds by a large measure the volume of purchases of any chain which does business in the Los Angeles Metropolitan Area, with the exception of large national chains such as A. & P., Safeway, and Acme Stores."

[fol. 2811] That results because all the large chains, I think the record shows, purchased from Certified.

The Court: All the large chains purchased from Certified?

Mr. Coyle: Except for A. & P., Safeway, and Acme Stores. I think the record shows that.

The Court: The implication you are giving me is they purchased most of their things from them; and I don't know that to be the fact.

Mr. Coyle: I don't think they purchased the most.

The Court: I think the record indicated to me they purchased some items from there, but I don't know how substantial they were in dollars and cents.

Mr. Coyle: I don't, either. But I don't think this finding has any meaning unless it reflects that.

The Court: I think from all the evidence in the case that it seems to me to lead me to that inference, that they certainly run far ahead of—all you have to do is take the volume of business of either one of these chains and compare it to what Certified does, and there you draw your conclusion.

Mr. Coyle: But these chains purchased from Certified. The whole is always greater than the parts.

The Court: I understand what you are talking about, but most of these chains—by "chains," of course, there again [fol. 2812] we are using a term that you can't define. You claim a chain is from two to three stores.

Mr. Coyle: I am not making any claim. I am just talking about this sentence here which says, "The volume of Certified's purchases exceeds by a large measure the volume of purchases"——

The Court: It is still a true statement. I think I will leave it. It is a true statement even though it may include, as you say, part of the whole.

All right. Next?

Mr. Coyle: Okay. Down to paragraph 36. Page 18, line 25.

"The membership of Certified"——

The Court: Page what?

Mr. Coyle: Page 18. I am sorry. Line 25.

The Court: Isn't that a correct statement?

Mr. Coyle: "The membership of Certified is made up of mainly small grocery retailers which are the primary source of Certified's business."

I don't think the record sustains that. Certified has large chains and has small chains, and there was no evidence as to who constitutes the major part of Certified.

The Court: I don't agree with you, counsel.

Take up something else.

[fol. 2813] I am sure the Supreme Court can check the record and go through this with meticulous care and find out if all this voluminous evidence supports that conclusion. I welcome them the opportunity.

Mr. Coyle: All right. No. 37 on page 19, line 6.

"Many of this area's leading chains commenced business here with one store . . ."

Some of them did and some of them commenced with two, some of them commenced by acquisition.

The Court: It says "Many"; what is meant by the word "Many"?

Mr. Coyle: I think Food Giant—somewhere else in these findings the statement is that Food Giant started with two stores. I don't think this finding adds anything.

The Court: I think the finding could stand, perhaps, some dressing. I think we can eliminate the problem by striking out those names, can't we?

What is the advantage of those names?

Mr. Alsup: I think the last sentence could very well be eliminated, your Honor.

The Court: All right, it is eliminated.

Any time I find agreement in one of these cases I am so startled that I want to get it down quickly.

All right. Next, Mr. Coyle?

[fol. 2814] I think we could save a lot of time if we just turned all the business in the country over to the Antitrust Department, and they could operate these companies, and they would be broke in a year and we wouldn't have any problems. We could all work together in one great Socialistic impulse.

Mr. Coyle: Is your Honor through?

Line 15 on page 19:

"The evidence fails to support the plaintiff's claim that the large chains have a substantial advantage in the purchase of meat supplies or dairy items."

The Court: Well, does the evidence bring me to that conclusion?

Mr. Coyle: I don't know what "a substantial advantage" means. They either have an advantage or they don't.

The Court: If they had an advantage in the purchase of one brand, for example we will say Jones Sausage, would you say that that would change the picture?

Mr. Coyle: It would be an advantage. And these advantages might accumulate.

The Court: Or Yuban Coffee. Let's say they could get—I am not saying that is a meat. I really do know the difference. But let's just say—let's not take a coffee; let's take T-bone steaks, which apparently are going out of style in most places, Safeway still sells them and sells a lot of [fol. 2815] them—if Safeway had an advantage on T-bone steaks because of a specialty, would you say it would make that unacceptable?

Mr. Coyle: I think the word "substantial"—that might be a substantial advantage, I don't know.

The Court: Counsel, that is the only way I know how to word it, and that was the conclusion I came to from the evidence in the case. I am unable to split these things up into the lowest denominators.

When you get into this, it is not mathematics, you know; it is mostly semantics.

I am going to leave that as it is.

Mr. Coyle: All right. Down to 39—

The Court: Paragraph 39?

Mr. Coyle: Paragraph 39, line 19 on page 19:

"The merger with Shopping Bag did not give Von's any competitive advantage in the purchase of groceries and related products, including fresh meats, produce, and dairy products."

It did give them the advantage of getting the Shopping Bag warehouse and getting the Shopping Bag—

The Court: I had a question mark on the word "any." The word "any" or "every" always disturbs me. I sup-

pose the word "substantial" could be substituted there.

Mr. Coyle: I think it did give them a substantial [fol. 2816] competitive advantage.

The Court: You may think that.

Mr. Coyle: I think the record shows that.

The Court: That is your opinion; not mine.

Mr. Alsup: Your Honor is going to substitute "a substantial" for "any"?

The Court: What did I say in my Opinion, counsel, do you remember?

Mr. Alsup: You didn't—

The Court: I didn't put it that way.

Mr. Alsup: On page 14, line 4, of your Opinion, your Honor, you stated—

The Court: Page 14?

Mr. Alsup: Page 14, line 4.

The Court: Let's see.

"The government appeared to contend that the large chains had a substantial advantage in the purchase of meat supplies. However, the evidence failed to support this claim."

You see, I put it in a style that you can't cut through.

Mr. Alsup: Then earlier, your Honor, on page 13, line 29, you referred to products carried by the cooperatives, and you state: "... there can be little doubt that the single (store) operator or small grocer can compete effectively [fol. 2817] with the large chains or anyone else in purchasing such groceries."

The Court: Yes, that's right.

Well, I think that ought to be changed. I think Mr. Coyle is correct. The word "any" is too all-inclusive. So I think—I still prefer what is in my opinion. I think I will just put—

Mr. Alsup: Actually, your Honor, 39 is really covered by 38, it seems to me.

The Court: Well, then, why repeat it?

Mr. Alsup: That just occurred to me, your Honor.

The Court: Out it goes.

Mr. Coyle: If we eliminated all the repetitive findings here, we would eliminate about half of them.

The Court: I think you are right in one respect, they are prolix, and I am sorry that they are, but here they are so let's deal with them.

Mr. Coyle: Is 39 eliminated?

The Court: It is eliminated. It is out.

I am sure that an IBM machine couldn't do this.

Go ahead.

Mr. Coyle: Finding 40, your Honor, is inconsistent with the court's Memorandum Opinion, and I think it is also very loosely written and ambiguous and prolix in general findings and should be eliminated.

[fol. 2818] The Court: Well, I think most of it is in accordance with the evidence.

The thing that bothers me is that first sentence.

Mr. Coyle: The first two sentences, I think.

The Court: Well, it is a contest, all right, for the patronage of customers and this is one of the most competitive fields in all the world right here in Los Angeles in the grocery business.

Mr. Coyle: If I could call your Honor's attention to the language we propose as a substitute for paragraph 40. We propose putting it this way—

The Court: I have read that over, counsel. The one that is in your proposal?

Mr. Coyle: Yes.

The Court: I read that over. I prefer to leave it as it is with just, probably—I am concerned not so much about the first sentence, but the second sentence: "Competition exists between any two stores only to the extent that they vie for the patronage of the same customers . . ."

I think that may be a little contradictory, because we can't say just where the fine line of competition is. I think generally it is true—

Mr. Coyle: Your Honor, excuse me. We have this chain competition, also, which extends to the acquisition of new locations and the competition to build up an image, that [fol. 2819] the evidence dealt with, an image that will enable them to go into new areas and draw customers and have a well-known trade name, and all these other things, reputation for good service.

Mr. Alsop: Your Honor, we have got the network of competition in that same sentence.

The Court: That may take care of it.

Mr. Alsop: Your Opinion points out, your Honor, on page 16, that only a few of those of Von's and Shopping Bag's were in direct competition, since generally they were

in different localities.

Perhaps if we put the word "direct" before "competition," it would conform to your Honor's opinion.

Mr. Coyle: We have this general competition——

The Court: Let me find out where he proposes to put the word "direct."

Mr. Alsup: Before the word "competition" on line 26, page 19.

The Court: I think that does do it, counsel.

Mr. Coyle: Direct competition exists between two stores in other fashions than this competition for the identical customers. Competition to buy better, competition to distribute better, competition to build up an image.

Mr. Alsup: Mr. Coyle is talking about grocery concerns, instead of retail grocery stores.

[fol. 2820] Mr. Coyle: That is the problem, we have these two types of competition, and this finding speaks as if there is only one.

The Court: It will be revised to read as follows:

"Direct competition usually exists between any two stores only to the extent," et cetera.

Mr. Coyle: Competition between firms and chains is not confined——

The Court: I am talking about competition between stores; not as between firms. The findings very clearly set out there is an over-all competitive situation in the whole area between all the firms.

Mr. Coyle: But, your Honor, the first sentence in this proposed finding 40 says, competition in the retail grocery business in the Los Angeles area.

That's not talking about store competition; that is talking about over-all competition.

The Court: I am going to leave it as is, counsel. Take up your next matter.

I think the rule of law used to be, and still is, that if the evidence in the case supports the judgment of the court, the findings can be completely disregarded. So if the evidence in the case supports the court's decision here, it wouldn't make any difference, really, if I did make a few minor errors, or even some major errors, in the findings. [fol. 2821]

Mr. Coyle: But the findings wouldn't be helpful to the Supreme Court, then.

The Court: All I can do is the best I can. What little erudition I may have, I am using it.

With my limited means we shall proceed.

Mr. Coyle: Your Honor, referring back to this 39, again, I think that the court found, and the evidence was clear, that the average customer in the Los Angeles Metropolitan Area is willing—I mean Finding 40—is willing to drive for at least 10 minutes, equivalent to about four miles, to shop. I think that should be in these findings in those words.

The Court: It is in here.

Mr. Coyle: No, it is not. It says, "In other areas the average customer . . ."

I think you should strike that "In other areas," and say, "The average customer . . ."

The Court: I think that's correct.

Why in other areas?

Mr. Alsup: May I suggest, your Honor, that our own exhibit, which was Exhibit AV, the evidence of the store managers is that the draw area may vary from a fourth of a mile up to two blocks, up to 10 miles in some areas.

The Court: That's right.

[fol. 2822] Mr. Alsup: What Mr. Coyle hopes to do by the reference to the evidence given by Dr. Jensen, and which your Honor felt was impeached during the trial, is to impeach your ultimate finding that very few Shopping Bag Stores competed with very few Von's Stores, and he is trying to take this 10-minute driving four-mile area to indicate 16 Von's Stores competed with 21 Shopping Bag Stores.

The Court: He can argue that if he wants to. If anybody wants to accept that, there is nothing I can do about it.

Mr. Alsup: I just didn't want the reference to the evidence to impeach the ultimate finding that actually few were in competition.

The Court: I think it is—isn't it rather clear from my opinion?

Mr. Coyle: He is talking about a witness who is impeached. This is a witness you relied on in your Memorandum Opinion.

Mr. Alsup: You said his chart was impeached.

Mr. Coyle: No, your Honor. Your Honor, I think this

man is putting words in your mouth. You admitted in evidence that chart, and—

The Court: I think I will strike out "In other areas." "The average customer . . .," I will leave it that way. I don't think it does any harm to the facts.

[fol. 2823] Mr. Alsup: I don't, either.

Mr. Coyle: It is a fact.

All right. Then down to this proposed Finding 42. The last sentence of Finding 42, we think, should read as follows—

The Court: You say the last sentence. What page?

Mr. Coyle: Page 21, line 5.

The Court: First point out what is erroneous about the sentence there.

Mr. Coyle: In the first place, this finding is taken verbatim from the pretrial conference order until it gets down to line 5. It is discussing general competition in the area. Then it says: "Competition between individual Von's and Shopping Bag Stores was limited to those instances . . ." We think it should be made clear that this competition is in contrast to the general competition.

We propose Language which would read—

The Court: I am going to leave that as is.

Mr. Coyle: Your Honor doesn't want to hear the language I propose?

The Court: Isn't that the language you had in your—

Mr. Coyle: Yes, your Honor.

The Court: I think I took a look at it, counsel.

[fol. 2824] Mr. Coyle: All right.

The Court: Why do you think I asked for the time since yesterday to go further, again? I told you even yesterday that I had read over your—mostly your arguments, I spent quite a little time reading your arguments before I got down to the proposed additional findings. All about the El Paso Gas case. As if that had any bearing here. I don't see that it does. So take up the next matter.

Mr. Coyle: Your Honor, I think this Finding 44, line 15 on page 21, I think it covers the same area as was covered by, I think, Finding 39, which was just eliminated.

The Court: I am going to leave that one. I think that's in keeping with what I found.

Mr. Coyle: Your Honor, Finding 45 speaks of some of

the successful firms operating in the area, but it doesn't mention the fact that there have been a lot of firms going out of business, also, in the area. I don't think it shows anything, really.

The Court: All right. Take up your next one. I am going to leave that as is.

Mr. Coyle: No. 46 on page 24, line 9, I think the language on lines 13 and 14, "... the capital requirements ... are not great, and the chances of success for any experienced and qualified new entrant are good"—the chances of success aren't good, because more of them are going out of business [fol. 2825] than are coming in.

The Court: Well, there you go with that major premise again. Because the big stores have taken the place of 4 stores, your major premise is that they are being pushed out of business. And that is a major premise that I cannot accept. But I do agree with you I don't like that language.

"... the capital requirements necessary to launch an enterprise for the retail sale of groceries is not great"—I don't like that, either. They may or may not be great. It depends on the circumstances. "and the chances of success for any experienced and qualified new entrant are good." I don't like the word "good." I don't like that.

In other words, the field is open, if you have sufficient capital and experience.

Mr. Alsup: Your Honor used the word "successful" on page 10 of your Opinion, and on page 19 you pointed out that competition is vigorous and open to anyone.

The Court: That is in keeping with what I found. I didn't say it was "good."

You could take out a graduate from the Harvard Business School and put him in the grocery business with unlimited capital, and he probably would be broke within the year because it takes experience to operate the grocery business. At least it did when I was a boy and worked in grocery [fol. 2826] stores, and I don't think it has changed. In those days, I suppose, if you sold a nickel's worth of crackers and cheese combined, you were making a substantial sale, but still you had to know how to do it, you had to know how to mix crackers and cheese and come out with a nickel's worth.

I think, counsel, we will have to revise this.

Mr. Alsup: How about eliminating everything after the first sentence, your Honor?

The Court: It is all one sentence.

Mr. Alsop: I mean eliminate from line 11 to and including 14.

The Court: I shall do that.

Mr. Coyle: Then going up to the line that is left, "There are no substantial barriers . . ." There is that word "no substantial."

The Court: That is my finding.

I think, counsel, today in Los Angeles in the oil business, for example, you would contend that a man would have a hard time going into the oil business and being successful. That would be my guess, that that would be your contention. But I would be willing, if there were enough involved, to step down off of this bench and open a station on any corner in any city in this area, and in two years I would have a substantial business. And do you know why? Service. But it [fol. 2827] would be a night and day job, 20 hours a day.

This is the thing in a lot of the grocery businesses around here. You may not know it, but there are people who are loyal to their old-time stores and go back, sometimes, even when they move a mile or two or five miles away, for a while they even go back to their old stores to buy merchandise. Because of what? Extra service.

Mr. Coyle: But I don't believe that is what the first sentence says. It says: "There are no substantial barriers to entry. . . ."

There are barriers, and they are substantial. You have to get the location, you have to get the capital—

The Court: I don't consider that to be barriers. I consider that to be in the economic pattern.

If you don't have a nickel, there is no reason to talk about the grocery business. You can't say, "I am broke, inexperienced, uneducated, but willing to borrow and open a grocery store." Don't think anybody is going to take you up.

Mr. Coyle: By "substantial barriers" you mean there is no law against opening grocery stores. But there are problems and it is difficult.

The Court: All right. Take up the next item.

I am convinced if you can't convince the Supreme Court in this case that there has been no substantial lessening of [fol. 2828] competition, that you are not going to have any effective success in the case, anyway. It seems to me we are concerning ourselves with some awfully small problems

here, some of them. Go ahead, though. I will hear you out. The other litigants may wait.

Mr. Coyle: Your Honor, referring to 47 and 48, this excerpts part of the material from the figures compiled by the State Board of Equalization, and we propose that the tables, themselves, be made findings.

The Court: I think they are included in the findings, aren't they?

Mr. Coyle: No, your Honor. We propose them. We propose them as findings. Only parts of them are included here. In other words, these findings, if you refer to page 28 of our last objections——

The Court: I see in the morning paper there is a prediction that the punitive approach of the Antitrust Department is going to be curtailed. Do you have any comment on that, counsel?

Mr. Coyle: I wasn't aware that we had a punitive approach.

The Court: I just wondered.

Mr. Coyle: If we have one, it should be curtailed, your Honor.

Mr. Alsup: May I say with reference to 47, your Honor, [fol. 2829] it is taken directly from the Opinion, bottom of 11 and 12, and based on the Lebhar affidavit.

Mr. Coyle: I am not objecting to the Opinion, but the proposed findings, on the grounds that it doesn't incorporate all the statistics in these various exhibits.

The Court: I will let it stand.

The next matter.

Mr. Coyle: Go down to Finding 50 on page 25, line 3.

The Court: Page what?

Mr. Coyle: Page 25, line 3, Finding 50. I think it uses all these words, "many," "open," when it should say "acquired," "usually beginning with a single store"——

The Court: I am going to let that stand, counsel. I have read it over very carefully and discussed it with them at a previous time, and I will let it stand. I think the evidence supports that conclusion.

Mr. Coyle: It is very loosely written.

The Court: It may well be, but we can't all be an H. L. Mencken when it comes to writing.

Mr. Coyle: Proposed Finding 52 on page 25. It starts at

the bottom of page 25. "The merger of Shopping Bag into Von's did not materially change the competitive situation in the area."

[fol. 2830] It did change the competitive situation in the area; it united Von's and Shopping Bag. Where there had been two chains there was one.

The Court: I think that is inherent in the statement, counsel. We can't take it out of context and take just that one statement. Of course they did eliminate the competition between each other, such as existed.

Mr. Coyle: That is a material change in the competitive situation in the area. It is not a true statement to say it didn't change the competitive situation.

The Court: We are talking about lessening competition.

Mr. Coyle: Not there.

The Court: I will leave it stand.

The Clayton test—I thought the Senate Committee made it rather clear the original Clayton test was no longer the test.

Mr. Coyle: This is a finding of fact, your Honor.

The Court: I know. When you start to make findings, it takes an expert to distinguish sometimes between a combined conclusions of law and a statement of fact, conclusion of fact. It is pretty difficult.

It is too bad we are not back in the days when we had to draw bills of exceptions and had to be more exact. But the practice has now become a sort of rapid fire proposition. [fol. 2831]

So I think under the modern practice this is probably good. I will let it stand. I think it is in keeping with the evidence.

Mr. Coyle: I just don't think it is an accurate statement.

The Court: All right. You can argue that when you get to the higher court.

Mr. Coyle: I think 53 is a conclusion, maybe. It is not a finding of fact, I don't think.

The Court: It is a combination of both, but I will let it stand. I think it wraps the two in one. I think you have conclusions of law wrapped into it. But it also is a statement of fact.

Mr. Coyle: Page 26, line 13, Proposed Finding 54, is vague. It doesn't state anything. It states: "... in only

four or five limited portions of the entire Los Angeles Metropolitan Area." I think that is contrary to the evidence and it is meaningless, really.

The Court: I think I will put in the word "*actually* directly competing for some of the same customers in only four or five"—

Mr. Coyle: What were those four or five portions?

The Court: I haven't finished. Let me change it and [fol. 2832] then you may criticize it.

"... in only four or five"—I suppose "areas" would be the word, wouldn't it?

Mr. Alsup: Or "communities," your Honor.

The Court: "Communities" I think would probably do it, or "areas."

Mr. Coyle: I don't know that there is any evidence of that. What is a community, your Honor?

The Court: I really don't have time to stop and define it, counsel.

Mr. Coyle: I think the findings should define it, and I think the findings are incomplete unless they do.

The Court: We will put it "... only four or five areas ..."

Areas can be big, large, small or minute.

I think the facts in the case, taking them all as a whole, it is pretty clear what that means.

All right. Your next objection.

Mr. Coyle: Then what stores are we talking about?

The Court: The next objection, please.

Mr. Alsup: Your Honor, we used the word "communities" in line 18; since you have used the word "areas" there, perhaps you would like to use it here.

The Court: Yes, I will change it to "areas."

Mr. Coyle: Your Honor, 57, 58 and 59 are legal conclusions. I don't think they are proposed findings. They are legal conclusions, outright legal conclusions. I don't think they are even mixed statements of fact.

The Court: I will leave them stand, counsel. They may well be, in part, legal conclusions, but how can you in an Opinion, for example, separate your legal conclusions from your ultimate statements of fact? Sometimes you can't!

Mr. Coyle: I think statements like this are proper in an opinion but not in findings.

The Court: We will let the court refer to the Opinion, then.

Mr. Coyle: All right, your Honor.

Proposed Finding 60. Again, it only presents the openings; it doesn't present the closings.

The Court: I will let it stand. I think it is supported by the evidence.

Mr. Coyle: But it is argumentative and distorted, unless it also shows the closings.

The Court: I will let it stand.

Your next objection?

Mr. Coyle: Your Honor, we also object to this footnote "Statistics with respect to store openings in later years have not been made available."

They are available. I don't know what this purports [fol. 2834] to mean, but they are available. They just weren't introduced into evidence. Nobody bothered to get them. The Board of Equalization has them.

The Court: I will let it stand.

Mr. Coyle: Your Honor, Proposed Finding 63 at the bottom of page 29, states, "... an increasing number of bantam stores or superettes ..." I don't know what a bantam store is. I think the evidence shows they are small stores like a mom and pop. And they are decreasing in number instead of increasing.

The Court: I will let it stand. I think the evidence supports this. I don't think it has too much effect in the case, anyway.

Mr. Coyle: That may be so, your Honor.

The Court: I don't think it is decisive.

Mr. Coyle: The same with 64, it says, "Another development since the merger"—the top of page 30—"has been the opening of so-called drive-in milk depots."

I don't know whether that is before the merger or after the merger. I think they have been here for a good number of years, these milk depots.

The Court: I don't think the record supports that. There may have been a very few of them. But the ones they are talking about here are the ones opened in recent years.

[fol. 2835] I don't think it is of great concern, so take up something else, please.

Mr. Coyle: Your Honor, Finding 74 on page 32.

The Court: One moment, counsel. I have been revising the original and I shouldn't have done it. I suppose it ought to be done over, I don't know. I marked up the copy, and I have been trying to change the original. I think it will have to be done over.

Mr. Alsup: I think it should be, your Honor, and we will be glad to do it.

The Court: All right. Let me go back a moment. You are on what page now?

Mr. Coyle: I skipped some of our objections. I am over on page 32.

The Court: Let's go back to page 26. I think the statement carries the wrong implication in line 29.

"Also, it is only natural that the shopping center owner would prefer a company with good credit . . ."

That's not what they prefer. They prefer somebody with practically unlimited credit, and somebody who has a large corporation and a great deal of resources back of them. So I think that ought to be changed. That is on page 26. It carries the wrong connotation. Line 30.

They prefer more than just good credit.

Mr. Alsup: Yes, your Honor.

[fol. 2836] The Court: When they go out to peddle a lease, they want to say, "We have leased to a "Store So-and-So, they are a nationally advertised name." This 25-year lease or 30-year lease, whatever is back of it, Kroeger or Safeway.

Mr. Alsup: I think the way your Honor phrased it in the Opinion is preferable.

The Court: How is that?

Mr. Alsup: "It is only natural that the shopping center owner would prefer the company with the greater financial resources."

The Court: All right.

I have an original and a copy that I am working with, so it is rather difficult. You make that change.

Let's move along here. We have only 12 minutes left before the noon hour.

Mr. Coyle: Your Honor, Proposed Finding 74—

The Court: Don't skip over 72. I don't like the language of 72.

Mr. Coyle: I don't like lots of this language, your Honor.

The Court: I am going to change that.

"The effect of the merger is insubstantial."

I don't know. If you want to say "not substantial"—
[fol. 2837] Mr. Alsup: I think that's preferable, your Honor.

Mr. Coyle: That same thing is repeated in about 15 of these findings.

The Court: It is nothing more than a conclusion, I agree with you. I will leave it in.

Mr. Alsup: Change the words to "not substantial"?

The Court: Yes.

Mr. Alsup: Very good, your Honor.

The Court: I think you are right, it is a conclusion of law.

Mr. Coyle: About three of these pages are just argumentative conclusions.

The Court: I don't think they will do you any harm on the appeal.

Mr. Coyle: I don't think the findings will be helpful.

The Court: If you don't think they are, we are not helping the Supreme Court.

Mr. Coyle: I thought we would be able to get some better findings.

The Court: I am glad to know you have this great concern and want to help the court.

Mr. Coyle: Proposed Finding 74 on page 32, line 5.
[fol. 2838] "After the merger, Von's was operating a total of 64 stores—less than 1.4 per cent of the total number of stores in the two counties."

I think that is meaningless unless you show that Von's Stores had over \$3,000,000 in sales.

The Court: All right. I will leave it stand.

What is next?

Mr. Coyle: Proposed Finding 75, your Honor, based almost entirely upon figures compiled by a man named Bouque, a witness Bouque, who was not called as a witness at the trial, who was thoroughly examined on his deposition and was discredited, and these statistics are just not reliable and not good statistics, these 1960 statistics. The court didn't rely on them in its Memorandum Opinion.

The Court: Are you speaking with respect to 75?

Mr. Coyle: Yes, your Honor.

Mr. Alsup: I might say that Mr. Bouque had actual sales figures for Safeway in 1960, which were furnished by Safe-

way to the government. I have a copy of the letter by which they were transmitted to the government. Mr. Bouque used the actual sales figures for Safeway and for Von's in 1960.

Mr. Coyle: Yes, your Honor, but he had no universe to compute these percentages.

The Court: All right. I will let it stand.

[fol. 2839] Mr. Coyle: Proposed Finding 76 says: "Von's market share decreased after its merger with Shopping Bag."

In the first place, that is not so, and there is no evidence in the record to support that conclusion. Von's market share almost doubled after its merger with Shopping Bag. That was the effect of its merger.

The Court: Counsel, how do you justify that statement?

Mr. Alsup: I think counsel has a point. I think the combined share of the market of the two concerns would be a more accurate way to state that.

That is based on the Bouque analysis and on the testimony of Mr. Von der Ahe, which you elicited, your Honor, at the trial.

Mr. Coyle: Your Honor, I don't think there was any real testimony of that. Market share was a percentage. There was no evidence of any percentage change after the merger. The merger occurred in March of 1960. Even Bouque didn't go beyond 1960.

The Court: Well, on this I am in doubt.

Mr. Alsup: Your Honor, if you are in doubt, let's eliminate it.

That was the testimony of Mr. Von der Ahe in response to a number of questions your Honor put to him.

The Court: I remember generally asking the questions, [fol. 2840] but it has been some time since the testimony, and this record is certainly voluminous.

Mr. Coyle: I am sure there was no testimony as to market shares—because nobody knows the market share unless you do a lot of research to do it.

The Court: I think that's true, I don't think we have the percentages. I think we had better eliminate 76, because I cannot say that that is really my finding.

Frankly, I don't think it is too great in importance.

Mr. Alsup: I don't either.

The Court: Let's eliminate it.

Mr. Coyle: Would you reconsider 75, your Honor? I think it has the same type——

The Court: Take up the next one.

Mr. Coyle: All right. Proposed Finding 77 says: "Both Von's and Shopping Bag were local concerns of local origin . . ."

Von's is still a local concern. I don't know what a local concern means.

The Court: I do. I will let it stand. If you don't, I do.

Mr. Coyle: Von's is traded on the New York Stock Exchange. It has——

The Court: Take up the next item.

[fol. 2841] Mr. Coyle: Subparagraph (a), the Great Atlantic & Pacific Tea Company. I think that concern is 80 per cent owned by one family. I think that is almost a family-owned corporation. At least it was until a few years ago. I think that ought to be specified if they are going to describe A. & P.

The Court: I don't think that is of any particular importance. I will leave it the way it is.

Mr. Coyle: I have one other problem with these figures. In these subparagraphs (a), (b), (c), (d), (e), and (f), I am not sure what year they are referring to. Is it this year or last year, 1960?

The Court: I don't know.

Mr. Coyle: I am sure that some of those stores—I feel sure——

The Court: I thought it intended to refer to the last year available.

Mr. Alsup: We had a specific series of exhibits on that, and it is my recollection that it related to 1962, but I can check it.

The Court: I think when you rewrite this you had better put in the year.

Mr. Coyle: I would suggest that they also show Von's sales and assets for the same year, because I believe this is for the purpose of comparison. It may be that Von's [fol. 2842] has sales that are greater than the Lucky Stores.

The Court: We have already stated those.

Take up the next matter.

Mr. Coyle: Your Honor, we have this "local" in quotations on page 34, line 28. I don't know what that means, or what those quotations are supposed to mean.

The Court: The word "local" just accentuates what it means.

Mr. Coyle: Is that different from the "local" up above?

The Court: Without explaining it, I will let it stand.

Mr. Coyle: Your Honor, this Proposed Finding 80 is very argumentative, and it says—refers to Plaintiff's Exhibit 8 by number and sets forth part of the exhibit. I think the whole exhibit should be set forth.

The Court: I will let it stand.

Mr. Coyle: Your Honor, I believe Proposed Finding 81 is very argumentative.

The Court: Well, I think it is in keeping with my findings. I will let it stand.

Mr. Coyle: Also 82 is very conclusory and argumentative.

The Court: I think in 82(b), "the most important chain" should come out, line 23. I think we substituted something [fol. 2843] a while back. You can use the same description there.

Safeway may think it is the most important, but others may not agree.

Next, counsel?

Mr. Coyle: Yes. Proposed Finding 83 refers to some of the prior mergers in the area, but it doesn't specify what those mergers are. We proposed some substitute language which would spell out the mergers which have been occurring in this area.

The Court: Well, I will let it stand. I think it is all right. 84 I have some question in my mind about.

Mr. Coyle: Yes, your Honor. I think that is very questionable.

The Court: That is, the first part of 84 there, where it says "is not an undue percentage share of the relevant market ..." I don't think there is anybody alive that can tell what is undue and what is not.

I suppose the courts have taken upon themselves to decide these things, but what is an undue percentage share of a relevant market, it certainly presents a problem to me.

Mr. Alsup: It does to me, too, your Honor. The three-judge court in the Crocker-Citizens—

The Court: That is not a final decision, you know.

[fol. 2844] Mr. Alsup: That's right. They used that language—

The Court: You can't take any of these decisions until——

Mr. Alsup: I would be perfectly willing, your Honor, and suggest that we strike out "is not an undue percentage share of the relevant market," and leave in, "is not sufficient to warrant a finding . . ."

The Court: All right. I will do that.

Mr. Coyle: Your Honor, could I suggest that we consider eliminating using these two percentage figures in here?

Mr. Alsup: I think that would follow, your Honor, from what we agreed to before. I would suggest after the words "Shopping Bag" in line 8——

The Court: Strike out down to "is not sufficient to warrant"?

Mr. Alsup: Yes, your Honor.

The Court: I agree. So done.

All right. Next, counsel.

Mr. Alsup: I think these subparagraphs (a), (b), (c), (d), and (e) are very argumentative.

The Court: I think they are more or less in conclusion form and they do intertwine fact and the conclusions of law, [fol. 2845] but I will let them stand, counsel.

If we tried to separate conclusions of fact and conclusions of law, we would never finish this matter. Von's would probably by that time have got into another business. Maybe they would have merged with Eastman Kodak, or somebody.

Mr. Coyle: Your Honor, Proposed Finding 85, I think that that is the last one we objected to, that is also argumentative and conclusory, and I don't think it adds anything to the findings.

The Court: Well, I agree with that. It may be partially a conclusion of law, but I agree with it. I don't think there is any monopoly in this area at all, not at all.

Of course, I have heard the evidence and I have seen it with my own eyes, but maybe I am blinded.

Mr. Coyle: These findings, like Finding 85 and (a), (b), (c), (d) and (e) of Finding 84, I think they are part of this general argumentative advocate's brief style that the findings were drafted in.

The Court: All right. What is next?

Mr. Coyle: That's it, your Honor.

The Court: All right. Prepare the findings as they have

now been revised and present them to me and I will sign them.

There will be no further hearings on the matter.
[fol. 2846] Mr. Alsup: I will, your Honor.

May I just—perhaps your Honor doesn't want to bother with this, but on page 8, line 25 of the Opinion there is a typographical error which you might wish to correct.

The Court: What line?

Mr. Alsup: Line 25, page 8, there is a typographical error. It shows Von's sales at \$98,000,000 when it should be \$93,000,000.

The Court: That certainly ought to be corrected.

Mr. Alsup: That is from our Exhibit 5, Mr. Coyle.

The Court: I wonder how that got to be? It was just a typographical error, I suppose. What was that?

Mr. Alsup: \$93,703,000.

The Court: Correct the original.

Mr. Alsup: There is a typographical error on page 3, line 6. I don't know whether you want to bother with this. It says "California corporation." Von's was a Delaware corporation.

The Court: What line?

Mr. Alsup: Page 3, line 6. "California" should read "Delaware."

The Court: That's right. It surely should.

Mr. Alsup: Line 32 of the same page, the "1933" should read "1930."

[fol. 2847] The Court: I don't see it at all.

Mr. Alsup: It should be "1930."

The Court: All right.

Mr. Coyle: You are changing this to "1930"? I am puzzled. This is the last line on page 3?

Mr. Alsup: Yes. It should be "since 1930."

Mr. Coyle: I am not sure. It says "1932."

Mr. Alsup: It said that as to Von's.

Mr. Coyle: It is a minor thing.

The Court: Anything further, gentlemen?

Mr. Alsup: Nothing further.

Mr. Coyle: Your Honor, I might suggest this. This thing is being printed. Maybe we should notify the printer?

The Court: Counsel, I have arrived at a point in this matter where I don't know whether it is humanly possible for the District Courts to carry on with the burden that is

being placed upon them by the higher courts. It seems we have come to an age in the thinking where a District Judge is nothing more than a clerk or servant, and the volume of work and the effort that is required in this job, I don't know how the District Judges are going to keep up, between the writs and the Constitutional problems, and the many, many myriad matters that are pouring in upon us from all directions, and with all these new laws being enunciated by the higher courts, and with the volume of business that [fol. 2848] they have, it is just getting to the point where we don't have time to breathe. So a case of this kind, with a calendar such as I have, it is a real problem. And beginning January 1st two of us take the criminal calendar with an expectation of about six to seven hundred criminal cases for a period of six months, together with the remaining civil cases that I shall have on the calendar, which are about 140. So when all these hours are taken up with this minutiae, you can understand how exasperating it becomes to a lowly District Judge.

We are now in recess.

[fol. 2849] Reporter's Certificate to foregoing transcript omitted in printing).

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

Civil Action No. 336-60-CC

[Title omitted]

**PLAINTIFF'S REQUEST FOR FINDINGS OF FACT AND
CONCLUSIONS OF LAW—Filed July 8, 1963**

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PLAINTIFF'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

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PLAINTIFF'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Plaintiff, the United States of America, requests the Court to make the following findings of fact and conclusions of law:

FINDINGS OF FACT

Jurisdiction

1. This is an action brought by the Attorney General of the United States to prevent and restrain an alleged violation by the defendants of Section 7 of the Clayton Act (15 USC § 18).^{*} (Order, Part I.)

2. Plaintiff is the United States of America. The named defendants are Von's Grocery Company and Shopping Bag Food Stores.^{*} (Order, Part I.)

3. Prior to March 28, 1960 the defendants operated as separate corporations; subsequent to March 28, 1960 they have operated as a single corporation, under the name Von's Grocery Co.^{*} (Order, Part I.)

4. Defendants Von's Grocery Company and Shopping Bag Food Stores were found and transacted business within the Southern District of California (Central Division), and the surviving corporation, Von's Grocery Company, is found and transacts business within the Southern District of California (Central Division). (Order, Part III., pars. 6, 11, 20.)

5. Prior to the merger both defendants were engaged in interstate commerce and were subject to the jurisdiction of the Federal Trade Commission. (Order, Part VIII, par. 1.)

6. The Court has jurisdiction to determine whether the merger of the defendants in this case violates Section 7 of the Clayton Act. (Order, Part VIII, par. 2.)

^{*} An asterisk indicates that the proposed finding is a verbatim restatement of a stipulation between the parties which was incorporated in the Pre-Trial Conference Order of April 24, 1961, as amended.

RELEVANT MARKET

A. Line of Commerce

7. Groceries and related products consist of, but are not limited to, the following: groceries, meats, produce, bakery goods, dairy products, delicatessen products, frozen foods, fruits, vegetables, household supplies, drugs and sundries. They are the products taken as a whole which are generally distributed to the public by grocery stores and supermarkets. Taken as a whole these products constitute the relevant line of commerce in this case.* (Order, Part III, par. 17.)

8. Groceries and related products, taken as a whole, have peculiar characteristics and uses in the operation of retail grocery stores which make them distinguishable from all other products. (Order, Part VIII, par. 8.)

9. Groceries and related products are the relevant line of commerce for determining whether this merger violated Section 7 of the Clayton Act. (Order, Part VIII, par. 9.)

B. Section of the Country

10. The relevant trade area in which the defendants operated prior to the merger was the Los Angeles Metropolitan Area, consisting of Los Angeles and Orange Counties.* (Order, Part III, par. 20.)

11. Combined Los Angeles County and Orange County have also been defined by the Bureau of the Census as the Los Angeles Metropolitan area since, taken together, they meet the tests set by the Department of Commerce in terms of population and commercial interchange.* (Order, Part III, par. 21.)

12. Los Angeles ranks as the second largest metropolitan area in the United States in terms of population, income, and retail dollar sales.* (Order, Part III, par. 22.)

13. Approximately 6,750,000 persons reside in the Los

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Angeles Metropolitan area, and total retail sales in the area were approximately \$9,100,000,000 in 1957, representing 42% of all California retail sales, 33% of total retail sales on the Pacific coast, and 25% of such sales in the 11 Western States.* (Order, Part III, par. 23.)

14. In 1960 only seven States in the United States had larger populations than the Los Angeles Metropolitan Area. (GX 2)

15. In 1960 the Los Angeles Metropolitan Area has a larger population than the combined populations of the 11 smallest States in the United States and the District of Columbia. (GX 3)

16. The Los Angeles Metropolitan area is more than a community. It is an appreciable trade area and a section of the country within the meaning of Section 7 of the Clayton Act.* (Order, Part III, par. 25.)

17. The Los Angeles Metropolitan area is the relevant section of the country for determining the effect of this merger. (Order, Part VIII, par. 12.)

C. Trade and Commerce in the Relevant Market

18. Sales of groceries and related products in the Los Angeles trade area are in the neighborhood of \$2.5 billion annually.* (Order, Part III, par. 26.)

19. Such products are produced, manufactured, processed or packaged by numerous suppliers located throughout the United States.* (Order, Part III, par. 27.)

20. A substantial volume of groceries and related products originates outside the State of California and is shipped into the Los Angeles area where it represents approximately 51% of all retail sales of such products.* (Order, Part III, par. 28.)

21. These products are shipped by air, truck, rail, and sea transportation into the Los Angeles area and subsequently sold by the defendants and other retail grocery

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firms to consumers in the Los Angeles area.* (Order, Part III, par. 29.)

22. In order to maintain a supply of such products at all times, the defendants and other retail grocery firms in the Los Angeles area purchase and distribute, or cause the distribution to their stores of new products to replenish or replace products sold. In the course of such distribution some of the products handled by the defendants are warehoused in their distribution center and some are not.* (Order, Part III, par. 30.)

23. Some groceries and related products are perishable and must be sold to the ultimate consumer in a very short time.* (Order, Part III, par. 31.)

24. Annual turnover in all of Von's and Shopping Bag's stores for the year 1960 for each of the company's divisions and for all products combined was as follows: Grocery, 15.26; Meat, 72.33; Produce, 10.04; Delicatessen, 29.15; Liquor, 7.80; Drug, 5.57; Department Stores, 2.71; Fountain, 28.76; and all products combined, 17.06. (GX 9)

25. A number of chains in the Los Angeles area operate purchasing offices staffed by full-time employees who are in contact with suppliers located throughout the United States to secure and effect the shipment of substantial quantities of groceries and related products into the Los Angeles area from facilities located outside the State of California.* (Order, Part III, par. 32.)

26. The buyers of groceries and related products employed by some of these chains occasionally make trips to other States and foreign countries to arrange the purchase and shipment of groceries and related products into the Los Angeles area.* (Order, Part III, par. 33.)

27. As a result of their buying operations, substantial quantities of groceries and related products which are produced or manufactured outside the State of California are shipped to distribution centers operated by the supermarket chains from which points they are delivered in trucks operated by the chains to the chains' retail stores for sale to

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consumers in the Los Angeles area.* (Order, Part III, par. 34.)

28. Employees of Von's, both before and since the merger, have made a number of trips outside the State of California for the purpose of arranging for the purchase of various products for resale in Von's retail stores. (GX 10)

29. Since prior to 1958, Von's operated a distribution center at 2700 Garfield Avenue, Vernon, California, serviced by the Atchison, Topeka and Santa Fe Railroad. (GX 10)

30. Since prior to 1958, Shopping Bag maintained a distribution center at 10150 Lower Azusa Road, El Monte, California, which was and is serviced by the Southern Pacific Railroad. This distribution center is now operated by Von's. (GX 10)

31. Since prior to 1958, and until February 1960, Shopping Bag maintained a distribution center at 1825 East 27th Street, Vernon, California, which was likewise serviced by the Southern Pacific Railroad. (GX 10)

32. No records maintained by either company reflect the actual value, tonnage or carloads of products produced outside of California and shipped by rail to the distribution centers listed in paragraphs 29, 30 and 31 above. (GX 10)

33. Both Von's and Shopping Bag had received shipments by truck at the distribution centers referred to in paragraphs 29, 30 and 31 above. Hundreds of truck lines have made such shipments in the years 1958, 1959 and 1960. No records maintained by either defendant reflect the value, tonnage or truckloads of products produced outside California and shipped by truck to either company at any of said distribution centers. (GX 10)

34. Both Von's and Shopping Bag have occasionally in 1958, 1959 and 1960 received products produced outside California and shipped to California by air or sea transportation. No records maintained by either company reflect the value or poundage of such products. (GX 10)

35. Both Von's and Shopping Bag have occasionally in

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1958, 1959 and 1960 received products produced outside California which were delivered directly to retail stores operated by them. No records maintained by either company reflect the value or poundage of such products. (GX 10)

36. A substantial quantity, if not the greater percentage of products sold by Von's and Shopping Bag in their retail stores, were and are produced outside of the State of California. (GX 10)

37. Warehouse facilities are necessary to Von's operation in order to maintain inventory control. (GX 11)

38. Such control is necessary in order to maintain a consistent supply of merchandise in Von's stores. (GX 11)

39. In order to maintain inventory control, it was necessary for Von to operate a fleet of 33 tractors and 39 trailers prior to the merger. (GX 11)

40. Each Von store receives at least one delivery of produce daily. (GX 11)

41. Each Von store receives from two to four deliveries of dry groceries every week. (GX 11)

42. In addition to groceries and related products which pass through their own warehouses, the defendants and other retailers in the Los Angeles area also received from other sources groceries and related products which originate from suppliers located throughout the United States. (Order, Part III, pars. 35-40.)

43. Numerous retailers in the Los Angeles Metropolitan Area also receive from cooperatives groceries and related products which originated from suppliers located throughout the United States.* (Order, Part III, par. 35.)

44. These cooperatives maintain warehouses and distribution centers which receive direct shipments of substantial quantities of groceries and related products from producing facilities located in various states and distribute such products in trucks to the retail stores operated by their members, pursuant to orders from such members.* (Order, Part III, par. 36.)

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45. Such cooperatives also maintain full time buying offices which are in contact with suppliers located throughout the country to effectuate the purchase and shipment to the Los Angeles area of groceries and related products. Such products are generally sold in retail grocery stores operated by the members of the cooperatives, but some cooperatives sell to non-members.* (Order, Part III, par. 37.)

46. Numerous producers, manufacturers, processors and packagers of groceries and related products located outside the State of California are represented by food brokers and manufacturers representatives in the Los Angeles area who arrange for the distribution of their products to retail grocery firms in the Los Angeles area.* (Order, Part III, par. 39.)

47. These brokers and manufacturers' representatives secure the shipment of products from warehouses located either inside or outside the state to retail grocery firms, cooperatives or other wholesalers in the Los Angeles area.* (Order, Part III, par. 40.)

48. In the course of their business both defendants purchased, received at their distribution centers, and sold in their supermarkets a substantial volume of groceries and related products which were produced outside of the State of California, and which represented approximately 51% of all retail sales by the defendants.* (Order, Part III, par. 16.)

49. Von and Shopping Bag, prior to the merger, were engaged in interstate commerce and Von presently is engaged in interstate commerce.* (Order, Part III, par. 41.)

D. Competition in the Relevant Market

50. Consumer shopping patterns for groceries and related products in the Los Angeles Metropolitan Area are based upon a number of variables. (Corey Dep., pp. 10-11; Bouque Dep., p. 48; Jenssen Tr. 6/14/63, p. 412.)

51. Some of the factors which are taken into considera-

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tion by customers in selecting the store at which they shop are: price, general appearance of the store, size of the store, variety of brands, parking space, whether the store is in a shopping center or is a free standing store, general familiarity with the store's reputation, quality of meat, quality of produce, variety of produce, checkstand service and cleanliness of the store. (Jenssen Tr. 6/14/63, p. 412; Corey Dep., pp. 10-11.)

52. Grocery shoppers are willing to pass other stores in order to arrive at the store which best satisfies their shopping needs. (Jenssen Tr. 6/14/63, pp. 411-412; Corey Dep., pp. 57-59; Hayden Dep., pp. 5-6.)

53. Von-Shopping Bag considers the over-all draw area of its stores to be 5 miles. (W. D. Hayden Dep., p. 5.)

54. The average customer in the Los Angeles Metropolitan Area is willing to drive for at least ten minutes, about 4 miles, in order to do grocery shopping. (Jenssen Tr. 6/14/63, pp. 398-399.)

55. Between 10 and 37 percent of all customers of Von and Shopping Bag stores come from outside the immediate trading area of the Von-Shopping Bag stores. (Bouque Dep., p. 46; Von der Ahe, Tr. 6/13/63, pp. 240-246.)

56. Loss of a major part of the customers residing outside of its immediate draw area would be a serious problem and Von would be forced to increase its competitive efforts to regain this trade. (Von der Ahe, Tr. 6/13/63, pp. 240-246.)

57. Stores of the leading chains in the Los Angeles Metropolitan Area are so located that there is a network of competition between them. (GX 84; Order, Part III, par. 46; Brown Tr. 6/14/63, p. 335.)

58. The leading chains in the area, as a result of this network of interlocking competition, are a part of the same competitive pattern and the activity of one chain directly or indirectly affects the other chains. (GX 84; Order, Part III, par. 46; Brown Tr. 6/14/63, p. 335.)

59. This interlocking network of competition has resulted in the utilization of certain identical competitive practices by the chains such as the widespread adoption of trading stamps by all chains and the response of other chains to Von's efforts to eliminate loss leaders. (Brown Tr. 6/14/63, p. 335; Von der Ahe Tr. p. 320; Order, Part III, par. 46.)

60. Prior to the merger the 20 leading chains of supermarkets in the Los Angeles Metropolitan Area were all a part of the retail grocery competition in the Los Angeles Metropolitan Area and as such each of these chains competed with each other and with other corporations and firms engaged in the purchase, distribution and retail sale of groceries and related products in the Los Angeles Metropolitan Area. As part of the competition, the major chains as well as other grocers frequently responded to competitive practices originated by one of the other major chains.* (Order, Part III, par. 46, as amended.)

61. In 1958 the 20 leading chains of supermarkets operating in the Los Angeles area competed intensively with each other and with other corporations and firms engaged in the sale of groceries and related products in the Los Angeles area. (Answer of Complaint par. 6.)

62. The 20 leading chains of supermarkets referred to in paragraph 61 above competed in the following activities: (GX 12)

- “(a) Competition to purchase supplies and merchandise on better terms than their competitors and to secure other purchasing advantages.
- (b) Competition to distribute products cheaper and to secure advantages in the distribution of products to their retail outlets.
- (c) Competition to increase the sale of groceries in their stores and to secure other selling advantages over each other.
- (d) Competition in advertising and promotional activities.
- (e) Competition to secure new store locations.”

* An asterisk indicates that the proposed finding is a verbatim restatement of a stipulation between the parties which was incorporated in the Pre-Trial Conference Order of April 24, 1961, as amended.

DEFENDANTS

A. Description of Von

63. Defendant Von's Grocery Co. (hereinafter referred to as Von) is a publicly held corporation organized and existing under the laws of the State of Delaware. At the time the complaint was filed it maintained its principal offices in Los Angeles, California. Subsequent to the merger, Von moved its offices to the former Shopping Bag Headquarters at El Monte, California.* (Order, Part III, par. 6.)

64. Von is one of the leading chains of supermarkets in the Los Angeles area. It is the successor of incorporated and unincorporated businesses which have been engaged in the purchase, distribution, and retail sale of a complete line of groceries and related products since 1932.* (Order, Part III, par. 7.)

65. In the 1959 fiscal year, Von operated 28 complete supermarkets in the Los Angeles area which had total annual sales of approximately \$85 million for an average of approximately \$3 million in sales per store. All of the Von supermarkets are of the self-service, cash-and-carry type.* (Order, Part III, par. 8.)

66. Prior to the merger, Von also owned and operated a modern distribution center in a 216,000 square foot building located on a 20-acre tract of land in the Los Angeles area. Direct railroad and truck shipments were made to this distribution center which provided facilities to receive and distribute groceries and related products to Von's supermarkets throughout the Los Angeles area. Von owned and operated approximately 33 tractors and 39 trailers which it used for transporting merchandise from the distribution center to the various supermarkets.* (Order Part III, par. 9.)

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B. Description of Shopping Bag

67. Prior to March 28, 1960, defendant Shopping Bag Food Stores (hereinafter referred to as Shopping Bag) was a publicly held corporation organized and existing under the laws of the State of California and maintained its principal offices in El Monte, California. On March 28, 1960, Shopping Bag was merged into Von and the separate corporate existence of Shopping Bag was terminated on that date.* (Order, Part III, par. 11.)

68. Prior to its merger into Von, Shopping Bag was one of the leading chains of supermarkets in the Los Angeles area. It was the successor to incorporated and unincorporated business entities which had been engaged in the purchase, distribution, and retail sale of a complete line of groceries and related products in the Los Angeles area since 1933. In the 1959 fiscal year, Shopping Bag operated 36 complete supermarkets in the Los Angeles area which had total annual sales of approximately \$79 million for an average of approximately \$2.1 million in sales per store. All of the Shopping Bag Stores were of the self-service, cash-and-carry type.* (Ord., III, ¶ 12.)

69. Immediately prior to the merger, Shopping Bag also operated a substantial distribution center which was served directly by railroad and truck, and which received and distributed groceries and related products to Shopping Bag supermarkets. To facilitate distribution to its supermarkets Shopping Bag owned and operated a fleet of trucks, trailers, and automobiles comprising about 166 units in all.* (Order, Part III, par. 13.)

C. Position of the Defendants in the Relevant Market

70. Prior to the merger both defendants were competitive factors in the Los Angeles Metropolitan Area.* (Order, Part III, par. 47.)

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71. The order and importance of retail chains in the Los Angeles area can be found in various statistical tables. One such table appearing in Food Topics Magazine was used by the Government in preparing Government's Exhibit 8 for the hearing on the preliminary injunction and was introduced by the defendants as Exhibit A in that hearing. The parties agree that it is accurate in certain respects. However, both parties clearly understand that this table is an estimate and may introduce other statistics and figures which are at variance with estimates appearing in the Food Topics table.* (Order, Part III, par. 48.)

72. The Food Topics Magazine study was for 1958, the last complete normal year prior to the merger; in 1959 a four-week strike closed most stores of the leading chains and the merger occurred in March 1960. (De Silva Aff. GX 91, pp. 2-3; Von der Ahe Tr. 6/13/63, pp. 229-230.)

73. In 1958 Von ranked third and Shopping Bag fifth in terms of total sales by grocery stores in the Los Angeles Metropolitan Area. Von had approximately 4.1% and Shopping Bag approximately 3.9% of all grocery store sales in the Los Angeles Metropolitan Area, as reported in the Food Topics Magazine study, which is discussed below. Shopping Bag ranked sixth and Von eighth in terms of total number of markets operated in this area in the same year.* (Order, Part III, par. 14.)

74. On the basis of Food Topics Magazine combined Von and Shopping Bag rank second in terms of dollar sales and in terms of total number of supermarkets in the Los Angeles Metropolitan Area. Following the merger Von's total assets were approximately \$42 million and it accounted for approximately 8% of all grocery store sales in the area.* (Order, Part III, par. 15.)

75. Information compiled by the Federal Bureau of Investigation from the defendants and in direct interviews with retail grocery chains in the area, and used by the defendants in preparing certain exhibits, demonstrates that

* An asterisk indicates that the proposed finding is a verbatim restatement of a stipulation between the parties which was incorporated in the Pre-Trial Conference Order of April 24, 1961, as amended.

the industry rank and percentage share of the ten leading grocery chains in the area were as follows in 1958: (GX 4)

Position of Von and Shopping Bag Among the Ten Largest Grocery Chains in the Los Angeles Metropolitan Area

	1958		Sales in Los Angeles Metropolitan Area Dollars	Percent- age
	Rank in Sales Before	After Merger		
Total of Von and Shopping Bag..	—	1	\$177,867,000	8.9
Safeway.....	1	2	161,233,000	8.0
Ralph's.....	2	3	128,283,000	6.4
Von.....	3	—	93,703,000	4.7
Market Basket.....	4	4	88,806,000	4.4
Thriftmart.....	5	5	88,583,000	4.4
Shopping Bag.....	6	—	84,164,000	4.2
Food Giant.....	7	6	72,727,000	3.6
Alpha Beta Raisins.....	8	7	62,727,000	3.1
Fox Markets.....	9	8	50,438,000	2.8
Mayfair.....	10	9	39,360,000	2.0

76. The only material difference between the rank and market share percentages shown in GX 4 set forth above and the dollar sale and market share statistics shown by Food Topics is that the Food Topics' study indicated that the combined Von and Shopping Bag sales did not equal Safeway's sales. However, the defendants now accept the information obtained by the Federal Bureau of Investigation as accurate in this respect. (GX 4)

77. Prior to the merger both defendants competed effectively against Safeway.* (Order, Part III, par. 49.)

78. Prior to the merger Von and Shopping Bag both experienced substantial growth in the Los Angeles Metropolitan Area. (GX 5)

79. In the period between 1954 and 1958 Von's total sales in the Los Angeles Metropolitan Area increased from \$64 million to almost \$94 million and Shopping Bag's total sales increased from \$55 million to \$84 million. (GX 5)

80. From the beginning of 1955 to the beginning of 1960, the total number of Von stores in operation increased from 22 to 28, while in the same period the total number of

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Shopping Bag stores increased from 24 to 38. (GX 13, GX 14, GX 15)

81. As of March 28, 1960, Von planned to construct six new stores and Shopping Bag planned to construct one. (GX 16)

82. Between 1949 and 1959, both defendants expanded into new areas, increased the number of their stores in operation, and increased their total dollar sales.* (Order, Part III, par. 51.)

83. In 1946 the Shopping Bag stores were largely in the northeast part of the Los Angeles Metropolitan Area and the Von stores, in the southwest part of the Area (GX 79); by 1950 there was a movement of both firms out of their respective areas (GX 80); this movement continued to 1955 (GX 81); by 1960 both chains had expanded well out of the areas in which they were located in 1946 with the result that each chain had stores located throughout the Los Angeles Metropolitan Area (GX 82).

84. By 1960 the defendants admit that 20 per cent of the stores operated by Von and Shopping Bag were so located that they competed with each other for some or all of the same customers. The stores which the defendants admit competed with each other are listed below (Von der Ahe Tr. 6/13/63, pp. 203-212; DX AV):

- (a) Von's store No. 27 at 15704 Whitwood Lane, Whittier, completely with Shopping Bag store No. 1 at 1611 West Whittier Lane, La Habra; the stores were $1\frac{1}{2}$ miles apart.
- (b) Von's store No. 27 competed with Shopping Bag store No. 21 at 1183 Quad Way, Whittier; the stores were $2\frac{1}{2}$ miles apart.
- (c) Von's store No. 29 located at 1000 East Valley, Alhambra, competed with Shopping Bag store No. 27 at 127 North Garfield, Monterey Park; the stores were $1\frac{1}{2}$ miles apart.
- (d) Von's store No. 4 at 2280 Atlantic Avenue, Al-

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hambra, competed with Shopping Bag store No. 27; the stores were 3 miles apart.

- (e) Von's store No. 31 at 973 South Glendora, West Covina, competed with Shopping Bag store No. 28 at 15427 Amar Road, La Puente; the stores were 1 mile apart.
- (f) Von's store No. 31 at 973 South Glen, West Covina, competed with Shopping Bag store No. 32 at 1170 West Garvey Boulevard, West Covina; the stores were 1½ miles apart.
- (g) Von's store No. 26 at 12156 Brookhurst Avenue, Garden Grove, competed with Shopping Bag store No. 33 at 9922 Catella, Anaheim; the stores were 1 mile apart.
- (h) Von's store No. 5 at 10001 Paramount Boulevard, Downey, competed with Shopping Bag store No. 35 at 9050 East Firestone Boulevard, Downey; the stores were 2 miles apart.

85. In addition to the competition admitted by the defendants, a study, based upon 2-mile draw areas, showed that the following Von and Shopping Bag stores competed for some or all of the same customers at the time of the merger (Bouque Aff., pp. 31, 32, 76):

- (a) Von's store No. 4 at 2280 Atlantic Boulevard, Monterey Park, competed with Shopping Bag store No. 40 at 1201 West Whittier, Montibello.
- (b) Von's store No. 29 at 1000 East Valley Boulevard, Alhambra, competed with Shopping Bag store No. 16 at 2200 West Valley Boulevard, Alhambra, as well as Shopping Bag store No. 11 at 2270 Huntington Drive, San Marino.
- (c) Von's store No. 27 at 15740 Whitwood Lane, Whittier, competed with Shopping Bag store No. 22 at 9140 East Whittier, Pico.

86. Twelve existing Von stores and 20 existing Shopping Bag stores were so located in 1960 that both a Von and a Shopping Bag store would be within a 10-minute driving time, representing a distance of approximately 4 miles, of

the same potential customers. (GX 85; Jenssen Tr. 6/14/63, pp. 397-403.)

87. An estimated one million customers, representing an approximate annual food expenditure of \$481 million were so situated in 1960 that they could shop at either a Von or a Shopping Bag store within a 10-minute driving time, representing a distance of approximately 4 miles. (GX 85; Jenssen Tr. 6/14/63, pp. 397-403.)

88. Defendants admit that the competition was intensive in those instances where a store of Von's and a store of Shopping Bag were so located that they could both compete for some of the same customers. (Order, Part III, par. 46, as amended.)

89. Subsequent to the merger Von cancelled plans to open a new Shopping Bag store at Mission Road and Belvoir Avenue in Grenada Hills because it would have competed with an existing Von store. (Von der Ahe Tr. 6/13/63, p. 218.)

90. Prior to the merger both Shopping Bag and Von were among the five chains listed in a widely distributed pricing service which carried an item by item analysis of the prices charged by the leading grocery chains in the area. (GX 21)

91. Subsequent to the merger, Shopping Bag was eliminated from the pricing study described in paragraph 90 above and was replaced by another grocery chain. (GX 22)

92. Prior to the merger Von and Shopping Bag watched each others advertising in the Metropolitan papers as well as the advertising of the other major chains. (GX 23, GX 24, GX 25, GX 26)

93. Prior to the merger, chains such as Von, Shopping Bag, Safeway, Ralph's Market Basket, Thriftmart and Food Giant checked the others prices. (GX 23)

94. Prior to the merger Von's Grocery Co. and Shopping Bag took into consideration the prices which the other charged, as well as the prices charged by the other leading chains, in the Los Angeles Metropolitan Area in determining prices to be charged. (GX 23, GX 24, GX 25, GX 26)

95. Such chains, however, did not customarily check the price of the so-called Mom and Pop stores (the smaller stores). (GX 23)

96. In 1959, the last full year prior to the merger, Von's

total advertising expenditures exceeded \$738,000 and Shopping Bag's total expenditures exceeded \$1,187,000. (GX 17)

97. Von and Shopping Bag were among the eleven retail grocery chains in the Los Angeles Metropolitan Area which did area-wide advertising prior to the merger. (GX 18)

98. Von and Shopping Bag were also among the relatively few retail grocery chains in the area doing radio and television advertising. (GX 17, GX 18, GX 19)

99. In 1959 Von received advertising allowances of approximately \$227,000 and Shopping Bag, \$304,000. (GX 20)

100. In the years 1957, 1958 and 1959, Von enjoyed profits of \$3.9 million, \$4.0 million and \$4.1 million, respectively, before provision for Federal Income Taxes. (GX 27)

101. In the years 1957, 1958 and 1959, respectively, Shopping Bag enjoyed profits of \$2.7 million, \$1.9 million and \$1.5 million before provision for Federal Income Taxes. (GX 27)

102. Both Von and Shopping Bag had experienced profitable operations in the three years prior to the merger. (GX 27)

103. For the years 1952, 1953, 1954, 1955, 1956 and 1958, the average income earned on invested capital, before taxes and interest, was as follows: Von, 42.0%; Shopping Bag, 28.1%. (GX 28)

104. On the basis of total sales, industry rank, percentage, market share, assets, advertising, promotion ability, expansion potential, earnings, financial stability, number of stores in operation, impact upon prices and consumer acceptance, both defendants in this case were substantial competitive factors in the purchase, distribution and retail sale of groceries and related products in the Los Angeles Metropolitan Area prior to their merger. (Order, Part III, pars. 6 through 52; GX 4, GX 5, GX's 9 through 23; GX 27, GX 29, GX 30, G 31, GX 32)

RELEVANT MARKET STRUCTURE

105. In the year 1948 the market are represented by the 20 leading grocery chains in the Los Angeles Metropolitan Area was 43.8 per cent; in 1953, it was 56.9 per cent. (GX 6, GX 7)

106. In the year 1948 the market share represented by the

16 leading grocery chains in the Los Angeles Metropolitan Area was 41.6 per cent; in 1958, it was 53.4 per cent. (GX 7)

107. In the year 1948 the market share represented by the 12 leading grocery chains in the Los Angeles Metropolitan Area was 38.8 per cent; in 1958, it was 48.8 per cent. (GX 7)

108. In the year 1948 the market share represented by the 8 leading grocery chains in the Los Angeles Metropolitan Area was 33.7 per cent; in 1958, it was 40.9 per cent. (GX 7)

109. The four leading grocery chains in the Los Angeles Metropolitan Area accounted for 24.4 per cent of all grocery store sales in 1958. The merger of oVn and Shopping Bag increased the market share of the top 4 to 28.8 per cent, based upon 1958 sales on a pro form abasis. (GX 8)

110. As a result of the merger between Von and Shopping Bag, the market share of the 4 largest chains in the store sales in 1958. The merger of Von and Shopping Bag based upon 1958 sales on a pro form a basis. (GX 8)

111. Since the beginning of World War II and particularly the last 15 years, Los Angeles has been one of the most rapidly expanding areas in the United States.* (Order, Part III, par. 24.)

112. In the last 20 years there has been an increase in the size of individual retail grocery stores in the Los Angeles area.* (Order, Part III, par. 42.)

113. Since 1940 there has been a decrease in the number of grocery stores in operation in the Los Angeles Metropolitan Area.* (Order, Part III, par. 44.) (Government Industry Witnesses.)

114. In the period between January 1, 1950 and January 1, 1963, the total number of grocery stores licensed to operate in the Los Angeles Metropolitan Area decreased by 1,673. (GX 33, GX 34, GX 35)

115. On January 1, 1950, the records of the State Board of Equalization indicate that there were 5,365 single outlet grocery stores and 856 multiple outlet grocery stores operating in the Los Angeles Metropolitan Area for a total of 6,221 stores. By January 1, 1961, the total number of single

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outlet grocery stores was 3,818 and the number of multiple outlet grocery stores was 923 for a total of 4,741. By January 1, 1963, the number of single outlet grocery stores was 3,590 and the number of multiple outlet grocery stores was 958 for a total of 4,548. (GX 33, GX 34, GX 35)

116. On January 1, 1950, there were 1.4383 grocery stores per thousand population in the Los Angeles Metropolitan Area; and on January 1, 1961 there were .6950 grocery stores per thousand population in the Los Angeles Metropolitan Area. (GX 33, GX 34)

117. Single outlet stores have been declining in numerical count and multiple outlet stores, particularly those controlled by the large chains, account for the bulk of the business done under newly obtained permits. (GX 33 through GX 43; Affidavit of John B. Marshall.)

118. In 1953 there were 704 chain grocery stores in the Los Angeles Metropolitan Area and by 1962 the total number of chain grocery stores increased to 1,085. (GX 74)

119. In 1953 chains of 10 or more stores accounted for 57.4 per cent of all chain grocery stores in the Los Angeles Metropolitan Area and by 1962 they accounted for 68.2 per cent. (GX 74)

120. In 1953 the 40 chains with the most grocery stores operated 574 stores; by 1962 the 24 chains with the most grocery stores operated 739 stores. (GX 75)

121. In 1953 chains of two or more stores accounted for approximately 12.7 per cent of all grocery stores in the Los Angeles Metropolitan Area; by 1962 they accounted for 23.6 per cent of all of such stores. (GX 76)

122. There is a very high percentage of discontinuance of permits by small, single outlet stores compared to a relatively small percentage of such discontinuances by the large chains. (GX 33 through GX 43; Affidavit of John B. Marshall.)

123. During the period between 1949 and 1958, 9 of the largest chains in the Los Angeles Metropolitan Area acquired 126 grocery stores from concerns outside the top 20 chains. (GX 44)

124. In 1958, 99 of the stores referred to in paragraph 123 were still operated by the acquiring chains and had sales of \$192.9 million. (GX 45)

125. Without the acquired stores referred to in para-

graphs 123 and 124 above, the market share of the top 20 chains in the Los Angeles Metropolitan Area in 1958 would drop from 56.9 per cent to 47.3 per cent. (Affidavit of Willard F. Mueller.)

126. There were other significant acquisitions and mergers occurring in the Los Angeles Metropolitan Area which supplement those listed in GX 44 for the period from 1949 through 1958. (Defense witness Godfrey Lebhar, GX 78.)

127. There have been additional significant acquisitions and mergers (including Von's and Shopping Bag) within the retail grocery industry in the Los Angeles Metropolitan Area subsequent to the period of time covered by GX 44. (Defense witness Godfrey Lebhar, GX 78; Government's industry witnesses.)

128. It is recognized in the industry that there has been a decline in the total number of stores serving the area; the combined market shares of the large chains is increasing; consolidations and mergers have played an important part in increasing concentration; single store operators are at a disadvantage in attempting to compete with the major chains; and only the chains with triple A financial ratings are considered for sites in major shopping centers. (Government industry witnesses.)

THE MERGER

129. Sometime in the latter part of 1957 or the early part of 1958, Mr. Theodore A. Von der Ahe, President of Von's Grocery Company, approached Shopping Bag and initiated the merger talks which led to the subject merger. (GX 46)

130. Prior to commencing negotiations with Shopping Bag, Von's had discussed possible mergers with Kroger's and Alexanders Markets. (Von der Ahe Tr. 6/13/63, pp. 181-182.)

131. In 1957 when the merger negotiations were begun, Shopping Bag's profits were at an all time high. (Von der Ahe Tr. 6/13/63, p. 231.)

132. On March 28, 1960, the merger of Von and Shopping Bag was consummated. (Order, Part III, paras. 4, 11.)

133. As a result of the merger, Von and Shopping Bag

were united under a single management, subject to the control of a single board of directors and a single group of officers. The combined defendants have secured competitive advantages in that their warehousing functions are united in a single operation, their advertising is consolidated, the search for new locations is now the responsibility of one organization instead of two, the inventory in the stores has been adjusted with the result that the stores of both chains now carry the same lines and the stores are now known as "Von's Shopping Bag." (Order, Part III, pars. 4, 6, 10, 11 and 41; GX 9, GX 10, GX 11, GX 21, GX 22, GX 23, GX 27; GX 47 through GX 71; Von der Ahe Tr. 6/13/63, pp. 252-257; Government industry witnesses.)

CONCLUSIONS OF LAW

1. Prior to the merger both defendants were engaged in interstate commerce and were subject to the jurisdiction of the Federal Trade Commission.

2. Prior to the merger both defendants transacted business and were found within the jurisdiction of the United States District Court for the Southern District of California (Central Division).

3. The merger of the defendants in this case is an acquisition covered by Section 7 of the Clayton Act, as amended.

4. The Court has jurisdiction to determine whether the merger of the defendants in this case violated amended Section 7 of the Clayton Act.

5. Groceries and related products, taken as a whole, is the relevant line of commerce in which to determine whether this merger violated amended Section 7 of the Clayton Act.

6. The Los Angeles Metropolitan Area is the relevant section of the country in which to determine whether the merger violated amended Section 7 of the Clayton Act.

7. The effect of the merger of the defendants may be substantially to lessen competition or to tend to create a monopoly in the relevant line of commerce in the relevant section of the country.

8. The merger of the defendants in this case violated

amended Section 7 of the Clayton Act and plaintiff is entitled to appropriate equitable relief.

Respectfully submitted, /s/ James J. Coyle, /s/ John F. Hughes, /s/ Malcolm F. Knight, Attorneys,
Department of Justice.

/s/ Margaret H. Brass, Attorney, Department of Justice.

Dated: July 5, 1963

CERTIFICATE OF SERVICE BY MAIL

(omitted in printing)

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

Civil Action N. 336-60-CC

GOVERNMENT'S MEMORANDUM ON THE ISSUES PRESENTED—
March 19, 1964

(Omitted in printing)

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